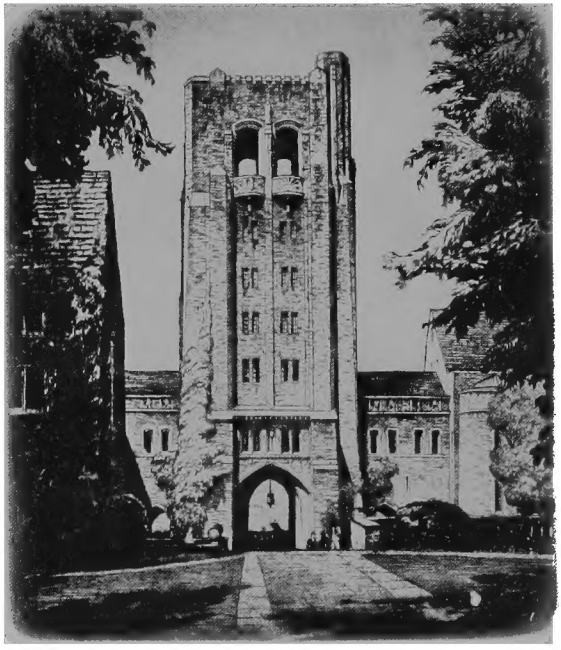
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COMMENTARIES

ON THE

LAW OF BAILMENTS,

WITH

ILLUSTRATIONS

FROM

THE CIVIL AND THE FOREIGN LAW.

By JOSEPH STORY, LL. D.,

ONE OF THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,
AND DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY.

"Leges autem a me edentur non perfectæ (nam esset infinitum), sed ipsæ summæ rerum, atque sententiæ." — CIC. DE LEGIBUS.

Seventh Edition.

REVISED, CORRECTED, AND ENLARGED,

BY

EDMUND H. BENNETT.

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NATHAN DANE, LL.D.,

DISTINGUISHED ALIKE FOR

PURITY, SIMPLICITY, AND DIGNITY IN HIS PRIVATE LIFE,

FOR

TALENTS, LEARNING, AND FIDELITY IN HIS PROFESSION,

AND FOR

PUBLIC LABORS IN THE STATE AND NATIONAL COUNCILS,

WHICH HAVE CONFERRED ON HIM

AN IMPERISHABLE FAME AS A STATESMAN AND PATRIOT,

This Work,

THE FIRST FRUITS OF THE PROFESSORSHIP FOUNDED BY HIS BOUNTY

IS RESPECTFULLY DEDICATED,

BY HIS OBLIGED FRIEND AND SERVANT,

THE AUTHOR.

ADVERTISEMENT

TO THE SEVENTH EDITION.

The last edition of these Commentaries was published in eighteen hundred and fifty-six. The constantly increasing demand for the work is the best evidence of its estimation by the learned profession. In the preparation of this edition several hundred cases have been added, and some new sections written. The present state of the law requires little addition to be made to the earlier chapters, but the chapter on Innkeepers and Carriers has received special attention, and to it the English Carriers' Act and the Railway and Canal Traffic Act have been added, with notes to the decisions thereon, to the present time. The new matter, except mere names of cases, is generally inclosed in brackets, thus [ ], to distinguish it from the original text.

EDMUND H. BENNETT.

Boston, January 1, 1863.

PREFACE.

THE following work has been prepared in the discharge of a part of the duties belonging to the chair of the Dane Professorship of Law in Harvard University. The Essay of Sir William Jones on the same subject is in the hands of every scholar and jurist, and deserves great praise for its elegant diction, its various research, and its abundant learning. Still it is but a mere outline; and it must be admitted to be very imperfect in its details, and occasionally quite erroneous in its principles. The author was (as every one perceives) deeply versed in the juridical antiquities of ancient and modern nations, and he indulged himself in a not unbecoming admiration and reverence of the Civil Law. He has everywhere manifested an extreme solicitude to make the principles of this branch of jurisprudence, as administered at Rome, appear in harmony with the common law, as administered in Westminster Hall. And this circumstance appears sometimes to have misled his judgment, and sometimes to have disturbed the clearness of his reasoning. For the other defects of his work a still more satisfactory apology may be found in the actual state of the English Law of Bailments at the time when he wrote his Essay. Few and scanty were the materials which could be gathered from any other sources than the jurisprudence of Continental Europe. Lord Holt's celebrated judgment in the case

of *Coggs* v. *Bernard*,[1] constituted at that period almost the only attempt to arrange the principles of the Law of Bailments in a scientific order. It was a prodigious effort, in which, however, he was greatly assisted by Bracton, and still more by the Civil Law, from which Bracton had drawn his own materials. In the Commentaries of Sir William Blackstone the title of Bailments occupies little more than two pages; and even these contain some incorrect statements. Yet the Law of Bailments is of vital importance in a large class of commercial transactions.

Sir William Jones, if not the first, was at any rate among the first to call the attention of English lawyers to the extraordinary merit of the treatises of Pothier upon the principal branches of Commercial Law. Nor is his eulogy upon this great man, warm and vigorous as it is, too strongly colored. Few works have ever appeared in the jurisprudence of any country, in which the qualities of "luminous method, apposite examples, and a clear, manly style," are more perfectly exhibited, than they are in the writings of Pothier.

But while a just commendation is given to this eminent jurist, it should not be forgotten, that an equally high tribute is due to his predecessor and real master, Monsieur Domat, whose work, entitled "The Civil Law in its Natural Order," considering the age and the circumstances in which it was written, is a truly wonderful performance. His method is excellent, and his matter clear, exact, and comprehensive. Pothier and other Continental jurists have drawn largely upon him to assist their own labors.

My design in the present Commentaries has been, to present a systematical view of the whole of the Common Law in relation to Bailments, and to illustrate it by, and throughout com-

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[1] 2 Ld. Raym. R. 909.

pare it with, the Civil Law, and the modern jurisprudence of some of the principal nations of Continental Europe. I have treated every branch of the subject (at the hazard of some repetitions) as a distinct and independent subject; believing, that, for elementary instruction, such a course would be found more convenient as well as more satisfactory, than the common method of reference to other heads. In this, as well as in many other respects, I have availed myself of the example of Pothier and Domat. I have not scrupled to follow in a great measure the method and arrangement of these authors; and I have endeavored to incorporate into my text almost every position to be found in their treatises, which could be of the slightest use, either in a practical or a theoretical view, to a student of the Common Law; so that the reader, if he is disinclined to go over the pages of those authors, will, I trust, find at hand whatever is generally valuable in their collective labors. I have, in like manner, availed myself of the writings of other distinguished civilians and commentators on the Civil Law, as far as their labors appeared to me to afford any new lights in the exposition of my subject.

Perhaps some apology may be thought necessary for my having, in a treatise on the English Law of Bailments, borrowed so largely from foreign sources. My reasons are as follows: — In the first place, the learned founder of the Dane Professorship, with that spirit of professional liberality which has always characterized him, suggested to me at an early period, the propriety of my presenting, in all my labors upon commercial law, some view of the corresponding portions of commercial jurisprudence of Continental Europe. To advice so given it was impossible not to listen with the utmost respect; and the wisdom of it has appeared more and more strongly to my mind, as it has been contemplated in all its bearings. In the next place, I have long entertained the belief,

that an enlarged acquaintance with the Continental jurisprudence, and especially with that of France, would furnish the most solid means of improvement of Commercial Law, as it now is, or hereafter may be, administered in America. Mr. Chancellor Kent has already led the way in this noble career;[1] and has, by an incorporation of some of the best principles of the foreign law into ours, infused into it a more benign equity, as well as a more persuasive cogency and spirit. The English common lawyers (it must be acknowledged with deep regret) have hitherto generally exhibited an extraordinary indifference to the study of foreign jurisprudence. Doctor Strahan, in the Preface to his translation of Domat, has spoken on this subject in language of such freedom and force, as entitle it to respect. I know not whether one ought to be most struck with the calmness of its rebuke, or with the mortifying severity of its truth. "I was surprised," says he, "to find, in a country (England) where all arts and sciences do flourish and meet with the greatest encouragement, that one of the noblest of the human sciences, and which contributes the most to cultivate the mind, and improve the reason of man, as that of the Civil Law does, should be so much disregarded, and meet with so little encouragement. And I observed, that the little regard, which has of late years been shown in this kingdom to the study thereof, has been in a great measure owing to the want of a due knowledge of it, and to the being altogether unacquainted with the beauties and excellences thereof; which are only known to a few gentlemen who have devoted themselves to that profession; others, who are perfect strangers to that law, being under a false persuasion that it contains nothing but what is foreign to our laws and customs. Whereas, when they come to know that the body of the Civil Law, besides the laws peculiar to

[1] 1 Kent, Comm. § 23, p. 481, *et seq.*

the Commonwealth of Rome, which are there collected, contains likewise the general principles of natural reason and equity, which are the fundamental rules of justice in all engagements and transactions between man and man, and which are to be found nowhere else in such a large extent as in the body of the Civil Law, they will soon be sensible of the infinite value of so great a treasure." Such is the language used by an English civilian more than a century ago. It is lamentable to say, that it may be applied, with but little mitigation, to the general state of the profession of the Common Law in our day.[1]

There is a remarkable difference, in the manner of treating juridical subjects, between the foreign and the English jurists. The former almost universally discuss every subject with an elaborate theoretical fulness and accuracy, and ascend to the elementary principles of each particular branch of the science. The latter, with few exceptions, write Practical Treatises, which contain little more than a collection of the principles laid down in the adjudged cases, with scarcely an attempt to illustrate them by any general reasoning, or even to follow them out into collateral consequences. In short, these treatises are but little more than full Indexes to the Reports, arranged under appropriate heads; and the materials are often tied together by very slender threads of connection. They are better adapted for those to whom the science is familiar, than to instruct others in its elements. It appears to me, that the union of the two plans would be a great improvement in our law treatises; and would afford no inconsiderable assistance to students in mastering the higher branches of their profession.

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[1] I take great pleasure in referring the reader to an excellent article on the Civil Law, published in "The American Jurist" for July, 1829, p. 39, *et seq.* It is written with all the sound judgment and practical sense of its learned author.

In the present work I do not pretend, in any suitable manner, to have accomplished such a plan as is here proposed. More learning and more leisure than are within my reach are requisite for such a task. I have, however, endeavored to bring together the products of my own imperfect studies. As the work is principally designed for students, I have not hesitated to repeat the same train of remark, whenever from a new connection, it might be useful to explain a difficulty, or to illustrate a new position or authority. I have also availed myself, occasionally, of the freedom belonging to a commentator, to express a doubt or to deny a doctrine. But I have rarely done so, except when the point has been purely speculative, or the common-law authorities justified me in the suggestion. Whatever is in this respect propounded, is to be considered submitted to the judgment of the reader, as matter worthy of further examination. If I have done any thing to lighten the labors of any ingenuous youth, who are struggling for distinction, or to attract abler minds to a more profound investigation of this branch of Contracts, I shall reap all the rewards which, beyond the mere fulfilment of duty, I have ever proposed to myself. I throw myself on the candor of a profession, from which I have uniformly received indulgence; and offer these Commentaries to the public in that spirit of subdued confidence, which invites examination, and, at the same time, is not unconscious of the real difficulties with which a work of this nature is attended.

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COMMENTARIES

ON THE

LAW OF BAILMENTS.

CHAPTER I.

ON BAILMENTS IN GENERAL.

SECT. 1. THE Law of Bailments lies at the foundation of many commercial contracts, and therefore is entitled to receive a distinct and independent consideration. It is of perpetual, although tacit, reference in the law of shipping and factorage; and a just understanding of it seems preliminary to a full discussion of those heads, as well as of many other important heads in our jurisprudence.

§ 2. The term, Bailment, is derived from the French word, *bailler*, which signifies to deliver.[1] It is a compendious expression to signify a contract resulting from delivery. Sir William Jones has defined bailment to be, "A delivery of goods on a condition expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they are bailed shall be answered."[2] He has again, in the closing summary of his Essay, defined it in language somewhat different, as "A delivery of goods in

[1] 2 Black. Comm. 451; Jones on Bailm. 90. See 1 Dane, Abr. ch. 17, art. 2.
[2] Jones on Bailm. 1.

trust, on a contract expressed or implied, that the trust shall be duly executed, and the goods redelivered, as soon as the time or use for which they were bailed shall have elapsed, or be performed."[1] Each of these definitions seems redundant and inaccurate, if it be the proper office of a definition to include those things only, which belong to the genus or class. Both of these definitions suppose, that the goods are to be restored or redelivered. But in a bailment for sale, as in the case of a consignment to a factor, no redelivery is contemplated between the parties.[2] In some cases no use is

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[1] Jones on Bailm. 117.

[2] Mr. Chancellor Kent, in his learned Commentaries, has expressed a doubt whether a consignment to a factor constitutes a case of bailment; and he says, that, in the present work on bailments, the term is applied to cases in which no return, or delivery, or redelivery to the owner or his agent is contemplated. He then adds: "But, I apprehend this is extending the definition of the term beyond the ordinary acceptation of it in the English law." 2 Kent, Comm. Lect. 40. I regret that I cannot concur in this opinion. According both to Lord Holt and Sir William Jones, a consignment to a factor for sale falls within the meaning of the term, bailment: and, indeed, it is difficult to perceive why it should not, if a bailment be a delivery for some special purpose. Lord Holt, in Coggs v. Bernard (2 Ld. Raym. 917, 918), in enumerating the various classes of bailments, says: "As to the fifth sort of bailments, namely, a delivery to carry, or otherwise manage for a reward to be paid to the bailee, these cases are of two sorts; either a delivery to one that exercises a public employment, or a delivery to a private person." He then proceeds to state, that of the first sort is the case of a common carrier, a common hoyman, a master of a ship, &c. He then adds: "The second sort are bailees, factors, and such like. And though a bailee is to have a reward for his management, yet he is only to do the best he can. And if he be robbed, &c., it is a good account. And the reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and *selling corn*, &c." And then, after stating the extent of his liability, he adds: "The same law [is] of a factor." Sir William Jones, speaking upon the subject of the different degrees of diligence required of different bailees, says: "When a person, who, if he were wholly uninterested, would be a mandatary, undertakes for a reward to perform any work, he must be considered as bound still more strongly to use a degree of diligence adequate to the performance of it, &c. This is the case of commissioners, factors, and bailiffs, when their undertaking lies in feasance, and not simply in custody." Jones on Bailm. 98. Whether the delivery be for a reward, or without a reward, for custody or for feasance, makes no difference as to the case being a bailment, and the persons to whom the delivery is made

contemplated by the bailee; in others, it is of the essence of the contract; in some cases, time is material to terminate the contract; in others, time is necessary to give a new accessorial right. Mr. Justice Blackstone has defined a bailment to be, "A delivery of goods in trust upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee;"[1] and in another place, as a "Delivery of goods to another person for a particular use."[2] It may, perhaps, be doubted, whether (although generally true) a faithful execution (if by faithful be meant a conscientious diligence or faithfulness, adequate to a due execution), or a particular use (if by use be meant an actual right of user by the bailee), constitutes an essential or proper ingredient in all cases of bailment. Mr. Chancellor Kent, in his excellent Commentaries,[3] has blended, in some measure, the definitions of Jones and Blackstone. Without professing to enter into a minute criticism, it may be said that a bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract, expressed or implied, to conform to the object or purpose of the trust.[4]

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being bailees, in the strictest sense of the term. Indeed, persons, to whom goods are delivered for sale (as factors are), are constantly treated in the old books as bailees. Thus, in Roll. Abridg. *Accompt*, 118, l. 35, it is said: "If a man bail goods to another to sell, and he sells them accordingly, the bailor ought to charge him as bailee, and not as receiver." So in 1 Roll. Abridg. *Accompt*, 119, l. 25, it is said: "If a man makes another the bailee of his wood, to put the same on sale, he ought to be charged as bailee, although he has not sold it." S. P. Com. Dig. *Accompt*, A. 3; 41 Edw. 3, 3. [So, in a recent case, receiving goods from another, upon an agreement to sell and account for them to the owner, or to return them as good as when taken, with interest, has been held to be a bailment, and not a sale. Morss *v.* Stone, 5 Barbour, Supreme Ct. (N. Y.) R. 516.] See also, Southcote's case, 4 Co. Rep. 83, 84; 1 Bell, Comm. § 202, 407, 408, 4th edit.; 1 Bell, Comm. p. 259, 476, 5th edit.; Ersk. Inst. B. 3, tit. 1, § 16, 17, 26; Id. tit. 3, § 31 to 39; 1 Stair, Inst. B. 1, tit. 12, § 1, 9, 19.

[1] 2 Black. Comm. 451.

[2] 2 Black. Comm. 395.

[3] 2 Kent, Comm. Lect. 40, p. 558, 4th edit.

[4] The late Mr. Wallace of the Philadelphia Bar, in an able article in the American Jurist for January, 1837, vol. 16, p. 253 to 285, insists that the defi-

§ 3. Bailments are properly divisible into three kinds. 1. Those, in which the trust is exclusively for the benefit of the

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nitions here given, as well as those of Mr. Justice Blackstone and Sir William Jones are inaccurate in stating, that a bailment is a delivery upon a contract express or implied, because, in two classes of bailments, namely, mandates and deposits, there is no contract expressed or implied. His argument, in substance, is, that every contract presupposes a sufficient consideration, in point of law, to sustain it; and that, as there is no sufficient consideration moving to the bailee in cases of mandates and deposits, as the bailee in both cases acts gratuitously, there can be no ground to say, that either of them is founded upon contract. It appears to me that there is more of legal astuteness and technical refinement in this objection than of truth. The word contract, like many other words, is often used in different senses. It is often used as equivalent to engagement, or undertaking, or promise, without any reference to the fact whether there be a sufficient consideration to support an action at law to enforce the engagement, or undertaking, or promise, or not. Thus, we often say that a particular person has promised, engaged, undertaken, or contracted, to do a gratuitous act, as, to write a review, to deliver a message, to deliver a book, to pay a bill for another. This, however, is not the sense in which the word contract is used in the definitions above referred to. They refer to such a contract, engagement, undertaking, or promise, as is founded on a sufficient consideration, and is capable of being enforced at law. And it seems to me very clear, both upon principle and authority, that in every case of a deposit, and of a mandate, there is such a contract, founded on a sufficient consideration, and capable of being so enforced, whenever the bailment has been executed by a delivery of the thing to the bailee. In the case of a deposit, no one can doubt, that there is an engagement or promise to redeliver the thing to the bailor. The latter parts with his possession of it upon the faith of the due fulfilment of that engagement or promise; and it cannot make any difference in relation to the legal validity of that engagement or promise, whether the bailee has expressly promised to redeliver it to the bailor, or whether it is inferred by implication from the acts and intentions of the parties. In each case the consideration is precisely the same. What is the consideration? It is on the part of the bailor yielding up his present possession, custody, and care of the thing to the bailee, upon the faith of his engagement or promise to redeliver it. It is true that the bailee may derive no benefit from the deposit. But that is not the only source of legal considerations. A detriment, or parting with a present right, or delaying the present use of a right on the part of the promisee, is a sufficient consideration to support a contract by the promisor, although the promisor derives no benefit whatever from it. In Comyns's Digest, Action on the Case, Assumpsit, B., it is laid down, that the consideration, upon which an assumpsit shall be founded, must be for the benefit of the defendant, or to the trouble or prejudice of the plaintiff. Thus, a forbearance of a suit against a stranger is a sufficient consideration to support a promise from the defendant. So, proof of a debt against a third person

bailor, or of a third person. 2. Those, in which the trust is exclusively for the benefit of the bailee; and, 3. Those, in

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is a sufficient consideration for a promise by the defendant to pay a debt, if made at his request. So, doing any act, at the request of another, is a sufficient consideration of a promise, although the act is no benefit to the promisor. So, a promise to give A. £100, if he would go to Rome, would be founded on a sufficient consideration to support an action for the money, if, upon the faith of the promise, A. went to Rome, although no benefit might accrue to the promisor; for in such a case, it is a trouble, or labor, or detriment to A. See Comyns's Digest, Action on the case upon Assumpsit, B. 1, 3, 4, 6, 11; Williamson *v.* Clements, 1 Taunt. R. 523; Longridge *v.* Dorville, 5 Barn. & Ald. 117. There is a clear distinction between the effect of a gratuitous engagement to take a thing on deposit, where the engagement is wholly unexecuted on both sides, and a like engagement, where the bailment has been completely executed on the side of the depositor by a delivery to and receipt by the bailee. In the former case, the engagement, being executory, cannot be enforced, it being purely voluntary; in the latter case, the bailment being executed, it becomes a valid and obligatory contract upon the bailee to perform the duty of redelivery, expressly or impliedly resulting from his engagement. The distinction was expressly put in the Year Book, 2 Hen. 7, 11, and still more pointedly by Lord Holt, in Coggs *v.* Bernard (2 Ld. Raym. 919, 920), where he said: "But secondly, it is objected, that there is no consideration to ground this promise upon (it was the case of a mandate to carry), and, therefore, the undertaking is but nudum pactum. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration. Indeed, if the agreement had been executory, to carry these brandies from one place to another such a day, the defendant had not been bound to carry them. But this is a different case; for assumpsit does not only signify a future agreement, but, in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And, if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing." The very point arose in Riches *v.* Briggs, Yelv. R. 4; s. c. Cro. Eliz. 883, where the question was, whether if A. delivers goods to B., and B., in consideration thereof, promise to redeliver the goods, an action will lie upon the promise against B. And it was held, that the delivery was a good consideration to support the action. This judgment was afterwards reversed, and judgment given for the defendant in a writ of error. But in Game *v.* Harvie, Yelv. R. 50, the whole Court said the reversal was wrong. In Pickas *v.* Guile, Yelv. R. 118, the doctrine was, however, maintained, that no action would lie in such a case, for want of a sufficient consideration. The doctrine was again reëxamined in Wheatly *v.* Law, Cro. Jac. 668; s. c. Palmer's R. 281, where there was a mandate of money, not goods, and it was finally established, that there was a sufficient consideration to support the action; and this last judgment was affirmed in error. Lord Holt, in Coggs *v.* Bernard (2 Ld. Raym. 920), recognized, in the fullest manner, the

which the trust is for the benefit of both parties, or of both or one of them and a third party. The first embraces Deposits

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authority of this last case, and said, that the reversal of the case was grumbled at, and finally the contrary doctrines solemnly adjudged. He then added: "And yet, there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it; and yet, that was held to be a good consideration. And so a bare being trusted with another man's goods must be taken to be a sufficient consideration, *if the bailee once enter upon the trust and take the goods into his possession.*" See also, Jones on Bailm. 51; Mytton *v.* Cock, 2 Str. 1099. The modern cases of Whitehead *v.* Greetham, 1 McClell. & Younge, R. 205; s. c. 2 Bing. R. 464; Doorman *v.* Jenkins, 2 Adolph. & Ellis, R. 256; s. c. 4 Nev. & Mann. 170; Robinson *v.* Threadgill, 13 Iredell, 39; Shiel *v.* Blackburne, 1 H. Bl. 158; and Shilibeer *v.* Glyn, 2 Mees. and Weslb. 143, seem fully to sustain the doctrine, that a delivery of the thing bailed is a sufficient consideration to support an action of assumpsit in cases of this sort. It might be added, that, in cases of deposits and mandates, the law imposes mutual and reciprocal obligations on each of the parties, where there is an executed bailment, and these reciprocal obligations constitute mutual and reciprocal considerations. See also, 1 Bell, Comm. § 199, 202, 4th edit.; 1 Bell, Comm. p. 258, 5th edit., and Ersk. Inst. B. 3, tit. 1, § 16, 17, 26; Id. tit. 3, § 31 to 39; 1 Stair, Inst. B. 1, tit. 10, § 10, 12; Id. tit. 12, § 1, 3, 10; Tompkins *v.* Saltmarsh, 14 Serg. & Rawle, R. 275; Rutgers *v.* Lucet, 2 Johns. Cas. 92. See also, Pothier on Oblig. n. 138, 139. In respect to the form of action, it seems, that in most, if not in all cases of bailment, the bailor has his election of a remedy against the bailee for negligence, misfeasance, or tort, either by an action on the case, or of assumpsit. It is not my design to answer the comments of Mr. Wallace; but merely to suggest some of the grounds, on which I still retain the opinion, in common with Mr. Justice Blackstone, Sir William Jones, Lord Holt, and Mr. Chancellor Kent, that every bailment involves a contract, express or implied. "A bailment of goods," said Sir James Mansfield, "to be redelivered, imports an agreement to redeliver. All special bailments import a contract to redeliver, when the purpose for which the goods were deposited is answered." Mills *v.* Graham, 4 Bos. & Pull. 140, 145. See also, Smedes *v.* Bank of Utica, 20 Johns. R. 377, 385; s. c. in Error, 3 Cowen, R. 662; Bank of Utica *v.* M'Kinster, 11 Wend. R. 473; Todd *v.* Figley, 7 Watts, 542. A learned writer in the English Monthly Law Magazine for April, 1839, has defined a bailment to be a "delivery of a chattel from one person to another, for a special object or purpose;" and he has criticized the definition in the text as redundant and inaccurate; because, in the first place, every trust involves a contract to conform to the object or purpose of the trust; and secondly, the term "trust" is ambiguous, inasmuch as, in strict legal phraseology, it is confined to express that particular species of confidence, which, as Blackstone observes, remains a kind of *peculium* in the courts of equity. The supposed redundancy, of which the learned writer complains, brings him in

and Mandates; the second, Gratuitous Loans for use; and the third, Pledges or Pawns, and Hiring, and Letting to Hire.[1]

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direct conflict with the opinion of Mr. Wallace, above stated; for, so far from a contract being implied in all cases, Mr. Wallace, as we have seen, contends, that, in some classes of bailments, there is no contract at all. In respect to the supposed inaccuracy in calling a bailment a trust, for which Blackstone is cited, it will be found, that Blackstone, in the passage cited, is so far from considering the word, trust, as limited in its meaning to such a trust as is within the jurisdiction of a court of equity, that he distinguishes that peculiar sort of trust by the term "a technical trust," and treats bailments as appropriately falling within the general definition of a trust, in the language of the law. The whole passage is as follows: — "A technical trust, indeed, created by the limitation of a second use, was forced into courts of equity, in the manner formerly mentioned; and this *species of trust*, extended by inference and construction, have ever since remained as a kind of *peculium* in those courts. But there are other trusts which are cognizable in a court of law; as deposits, and all manner of bailments." 3 Black. Comm. 431, 432. And Blackstone's own definition of bailments, cited in the text, speaks of a bailment as being a trust upon a contract. Indeed, the main distinction between his definition, and that relied on in the text, is in the omission of the word "faithfully," and of "a particular use." If, by the word "faithfully," Blackstone merely meant, with a just regard of adherence to duty, or with a due observance of his undertaking or contract, which will in substance be found among the definitions of Dr. Johnson, then the definition is sufficiently exact. If, on the other hand, by "faithfully" he meant a conscientious diligence or faithfulness, adequate to the due execution of the object of the bailment, then there is reason to doubt, if, in all cases of bailments, that is required. See Post, § 175 to 187. But, if by "faithfully" he meant merely honestly, uprightly, or without fraud, which also will be found among Dr. Johnson's definitions, then the word is misplaced; for an honest, upright performance of the duty, without fraud, is not, in all cases of bailment, sufficient to exempt the bailee from responsibility. In the last sense, the word has no proper place in the definition; in the first, it may mislead by its ambiguity; and the sense of the definition is complete without it. The other part of the writer's criticism is well founded. There was an inaccuracy in the former edition in using the word "diligent" as the equivalent of "faithful," without other explanatory words. I have endeavored now to make my meaning more clear. The learned critic's own definition has the merit of conciseness, and, perhaps, is entirely unexceptionable. And yet, it may admit of some doubt whether it is complete. If all bailments are, as he supposes, founded in contract, that circumstance should constitute a part of the definition. If all bailments are founded on a trust, that also is a proper ingredient. The omission of both of

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[1] See the English Monthly Law Magazine for April, 1839, p. 216, 217.

§ 4. A DEPOSIT is commonly defined to be a naked bailment of goods to be kept for the bailor without recompense,[1] and to be returned when the bailor shall require it. The appellation and the definition are both derived from the civil law. *Depositum est, quod custodiendum, alicui datum est.*[2]

§ 5. A MANDATE is commonly defined to be a bailment of goods without reward, to be carried from place to place, or to have some act performed about them.[3] This appellation also is derived from the civil law. *Mandantis tantum gratiâ intervenit mandatum*, is the language of the Institutes;[4] *Mandatum, nisi gratuitum, nullum est*, is that of the Pandects.[5]

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these would seem, therefore, to be a defect; for the very object of a definition, is to present to the mind of the reader all the material ingredients, necessary to explain and limit the meaning. Indeed, if one were disposed to refine, it might be said, that game delivered to a friend to be eaten at his own table, or wine delivered to a friend to be drunk at the marriage of his daughter, was a bailment within the very words of his definition; for it would be the delivery of a chattel from one person to another for a special object or purpose; and yet it would not be doubted, that it was, in fact, not a bailment, but a gift. See Post, § 228. It may be added, that a bailment is strictly a trust in the common juridical sense of the word; and that a technical trust in lands in courts of equity is but a species of the generic appellation. Comyns, in his Digest (Chancery 4, W. 5), says: "So, if a man gives goods or chattels to another upon *trust* to deliver them to a stranger, Chancery will oblige him to do it." No one can doubt that such a delivery is a bailment; and this statement is made by Comyns upon his own great authority. After all, in cases of this sort, one is often reminded of the sound admonitions of the maxims of the civil and the common law. Nimia subtilitas in lege reprobatur. Omnis definitio in lege periculosa est.

[1] Jones on Bailm. 36, 117. See also, 1 Bell, Comm. § 199, 4th edit.; 1 Dane, Abr. ch. 17, art. 2, § 3; 2 Kent, Comm. Lect. 40, p. 560, 4th edit.; 1 Stair, Inst. B. 1, tit. 13, § 1.

[2] Dig. Lib. 16, tit. 4, l. 1; Just. Inst. Lib. 3, tit. 15, § 3; 1 Domat, Civ. Law, B. 1, tit. 7, § 1; Pothier, tit. Traité du Contrat de Depot. art. prelim.; Wood, Inst. Civ. Law, B. 3, ch. 2, p. 216; Vinnius in Inst. Lib. 3, tit. 15; Heinec. Elem. Jur. Lib. 3, tit. 15, § 1791; 2 Kent, Comm. Lect. 40, p. 568, 3d edit.

[3] Jones on Bailm. 36, 117. See also, 1 Bell, Comm. § 202, 4th edit.; 1 Bell, Comm. p. 259, 5th edit.; 1 Dane, Abr. ch. 17, art. 5; 1 Stair, Inst. B. 1, tit. 12, § 1.

[4] Inst. Lib. 3, tit. 27, § 1.

[5] Dig. Lib. 17, tit. 1, l. 1. See also, 1 Domat, B. 1, tit. 15, § 1; Pothier, Traité de Mandat. art. prelim.; Wood, Civ. Law, B. 3, ch. 5, p. 242.

§ 6. A LOAN FOR USE, called in the civil law *Commodatum*, is a bailment of goods to be used by the bailee temporarily, or for a certain time without reward.[1] The same definition is given in the civil law: *Commodata autem res tunc proprie intelligitur, si nullâ mercede acceptâ vel constitutâ, res tibi utenda data est. Gratuitum enim debet esse Commodatum.*[2] It differs from what is called in the civil law a *Mutuum* in this, that in a *Commodatum* the goods are lent to be specifically returned; in a *Mutuum* the goods are to be consumed, and are to be repaid in property of the same kind.[3] Thus, corn or wine, delivered to one to be consumed, and to be repaid in kind, is a case of *Mutuum;* but if a horse be gratuitously lent for a journey, it is a case of *Commodatum.*

§ 7. A PLEDGE, OR PAWN, is a bailment of goods to a creditor as security for some debt or engagement.[4] In the civil law, that was properly called a *Pignus* (Pledge), where the thing was delivered to the creditor. If it remained with the debtor, although pledged as security, it was called an *Hypotheca* (Hypothecation). *Proprie Pignus dicimus, quod ad creditorem transit; Hypothecam, cum non transit, nec possessio ad creditorem.*[5]

§ 8. A HIRING, called in the civil law, *Locatio-Conductio*, is a bailment always for a reward or compensation. It is divisible into four sorts. 1. The hiring of a thing for use (*Locatio Rei*). 2. The hiring of work and labor (*Locatio Operis Faciendi*). 3. The hiring of care and services to be per-

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[1] Jones on Bailm. 36, 117. See also, 1 Bell, Comm. § 197, 4th edit.; 1 Bell, Comm. p. 255, 5th edit.; 1 Dane, Abr. ch. 17, art. 2; 2 Kent, Comm. Lect. 40, p. 573, 4th edit.; 1 Stair, Inst. B. 1, tit. 11, § 8.

[2] Inst. Lib. 3, tit. 15, § 2; Pothier, Traité de Pret. à Usage, art. prelim.; Wood, Civ. Law, B. 3, ch. 1, p. 215; Dig. Lib. 13, tit. 6; 1 Domat, B. 1, tit. 5, § 1.

[3] Inst. Lib. 3, tit. 15, § 2; Wood, Civ. Law, B. 3, ch. 1, p. 212; Pothier, Traité de Pret. de Consumption, art. prelim.; 1 Bell, Comm. § 197, 4th edit.; 1 Stair, Inst. B. 1, tit. 11, § 1 to 7.

[4] Jones on Bailm. 36, 117; Inst. Lib. 3, tit. 15, § 4; Wood, Civ. Law, B. 3, ch. 2, p. 218; 1 Bell, Comm. § 200, 4th edit.; 2 Kent, Comm. Lect. 40, p. 577, 3d edit.; 1 Stair, Inst. B. 1, tit. 13, § 11; 1 Dane, Abr. ch. 17, art. 4, § 1.

[5] Dig. Lib. 13, tit. 7, l. 9, § 2; Lib. 20, tit. 1; 1 Domat, B. 3, tit. 1, § 1.

formed or bestowed on the thing delivered (*Locatio Custodiæ*). 4. The hiring of the carriage of goods (*Locatio Operis Mercium Vehendarum*) from one place to another.[1] The last three are but subdivisions of the general head of hire of labor and services. These divisions, it will at once be perceived, are borrowed from the civil law; and they have been transferred into our law by the elaborate opinion of Lord Holt, in the case of Coggs *v.* Bernard,[2] and by the elegant genius of Sir William Jones, in his Essay on Bailments.[3] Upon these definitions of the different kinds of bailments we shall have occasion more particularly to comment hereafter.[4]

§ 9. It must be obvious upon the slightest consideration, that these various classes of bailments admit, or may admit, of very different obligations on the part of the bailee, both as to the nature and as to the extent of his responsibility. Where, indeed, he enters into an express contract, there may not, in point of morals, *in foro conscientiæ*, be any difference in relation to the extent of his duty, or the fidelity to be exacted of him in his performance of it. But law, as a practical science, although it endeavors never to violate any moral duty, is compelled, on many occasions, to leave that duty wholly to the conscience of the party, without any attempt to enforce it by compulsive process. It is, for instance, a rule of the common law, which has its foundation also in other codes, not to enforce contracts made between parties, where there is no valuable consideration for the act to be done. If the act is left undone, the party, although his promise may be ever so direct and positive, is not compellable to perform it. If, for instance, a person has gratuitously promised to give another money, the law will not oblige him to perform his promise; for it is deemed a *nude*

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[1] Jones on Bailm. 36, 117; Wood, Civ. Law, B. 3, ch. 5, p. 235; Inst. Lib. 3, tit. 25; Dig. Lib. 19, tit. 2; Pothier, Traité de Louage, ch. 1, n. 1; 1 Domat, B. 1, tit. 4, § 1. See also, 1 Bell, Comm. § 198, 4th edit.; 1 Bell, Comm. p. 452, 5th edit.; 1 Dane, Abr. ch. 17, art. 4; 2 Kent, Comm. Lect. 40, p. 585, 4th edit.; 1 Stair, Inst. B. 1, tit. 15, § 1.

[2] 2 Ld. Raym. R. 909; s. c. Com. Rep. 133; 1 Salk. 23; Holt, R. 13.

[3] See Ayliffe, Pandect, B. 4, tit. 7, 10, 11, 16, 17, 18, 20; 1 Bell, Comm. § 198, 4th edit.; 1 Bell, Comm. p. 452, 455, 458, 459, 461, 465, 5th edit.

[4] See the English Monthly Law Magazine, for April, 1839, p. 216, 217.

pact (*nudum pactum*), a naked promise, not clothed with a valuable consideration to support it; and the maxim is, *Ex nudo pacto non oritur actio.*[1] If, on the other hand, the money has been paid, the law will not enable the party to recover it back, because it has been paid in discharge of a moral obligation. But, if a party, undertaking to do a thing, does it so ill, that the other party suffers an injury thereby, there, the law will, in many cases, allow the injured party to recover a compensation to the extent of the injury.[2] In respect, therefore, to gratuitous contracts, lying in feasance, such as mandates, the party may escape all responsibility by a single refusal to do the act promised.[3] This distinction has been long settled in our law, upon principles of general policy; and although it may seem somewhat artificial, it is probably well founded in public convenience. It is generally true, in gratuitous contracts, that for nonfeasance, even when the party suffers a damage thereby, no action lies; but for misfeasance an action will lie. Sir William Jones,[4] indeed, supposes, that in each case, if there is a special damage, an action for that damage may be maintained. But he is certainly mistaken.[5] The reason of this distinction may probably be, that in cases of nonfeasance it is the party's own folly to trust to a promise, which has no legal obligation; but that in cases of misfeasance, the other party has no right to excuse a wrongful act by setting up the defence, that he was not bound to do any thing. Upon this subject more will be said, when we come to the consideration of the Law of Mandates.[6]

§ 10. But to return. The general principles of law in respect to bailments are founded upon the absence of any positive engagements between the parties (for an express contract

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[1] Batson *v.* Donovan, 4 Barn. & Ald. 21, 34.

[2] Post, § 164 to 172.

[3] Jones on Bailm. § 54; Post, § 164 to 192; 16 American Jurist, p. 269 to 272 (1837).

[4] Jones on Bailm. 56, 100, 101.

[5] Elsee *v.* Gateward, 5 T. R. 143; Cogg *v.* Bernard, 2 Ld. Raym. 909, 919, 920; 11 Hen. 4, 33; Post, § 164 to 172.

[6] Post, § 164 to 172.

of the parties may vary or supersede those derived from the law);[1] and, therefore, the question arises, what obligations are, with reference to public and general convenience, implied by law in the absence of such positive engagements. Natural justice would hardly persuade us that the same obligations and the same duties ought to arise in all classes of bailments; and if it would, the general interests of society and the indulgence to involuntary error and mistake, which a sense of mutual infirmity insensibly produces, would soon introduce a relaxation of the rigid rule, and fix a practical exposition, which should invite rather than repel mutual confidence. It would be very difficult, indeed, to persuade any civilized community, that a depositary should be liable for every loss, and bound to the same vigilant care of the deposit, as a borrower for his own exclusive benefit; or that a mandatary, who, from mere kindness, gives his services to his friend, should have the same responsibility fastened on him, as a carrier for hire, who stipulates and receives a suitable and adequate reward both for his services and his vigilance. And it will accordingly be found, that in the most polished, as well as in the least refined of nations, whether ancient or modern, distinctions in degrees of responsibility have been adopted in all these classes of cases, with a surprising uniformity. It is not our purpose to dwell on them; but many of them will be found collected in the beautiful Essay of Sir William Jones, which, with all its defects, will always constitute a gratifying and useful study for every jurist and scholar.

§ 11. Before entering, however, upon a particular consideration of the distinctions of the common law, with a view of ascertaining the precise nature and extent of the obligations of the bailee in the various sorts of bailment, it may be of use to say a few words on the subject of the various degrees of care or diligence, which are recognized in that law. It has been justly said, that there are infinite shades of care or diligence, from the slightest momentary thought to the most vigilant anxiety; but extremes in this case, as in most others, are inapplicable to practice.[2] There may be a high degree of dili-

[1] Post, § 31, 33, 34.

[2] Jones on Bailm. 5.

gence, a common degree of diligence, and a slight degree of diligence; and these, with a view to the business of life, seem all that are necessary to be brought under review. Common or ordinary diligence is that degree of diligence which men in general exert in respect to their own concerns. It may be said to be the common prudence, which men of business and heads of families usually exhibit, in affairs which are interesting to them. Or, as Sir William Jones has expressed it,[1] it is the care, which every person, of common prudence, and capable of governing a family, takes of his own concerns.[2] It is obvious, that this is adopting a very variable standard; for it still leaves much ground for doubt, as to what is common prudence, and who is capable of governing a family. But the difficulty is intrinsic in the nature of the subject, which admits of an approximation only to certainty. Indeed, what is common or ordinary diligence is more a matter of fact, than of law.[3] And in every community it must be judged of by the actual state of society, the habits of business, the general usages of life, and the dangers, as well as the institutions, peculiar to the age. So that, although it may not be possible to lay down any very exact rule, applicable to all times and all circumstances; yet that may be said to be common or ordinary diligence, in the sense of the law, which men of common prudence generally exercise about their own affairs in the age and country in which they live.[4]

§ 12. It will thence follow, that, in different times and in different countries, the standard is necessarily variable with respect to the facts, although it may be uniform with respect to the principle. So that it may happen, that the same acts which in one country, or in one age, may be deemed negligent acts, may, at another time, or in another country, be justly deemed an exercise of ordinary diligence.

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[1] Jones on Bailm. 6.

[2] Tompkins *v.* Saltmarsh, 14 Serg. & Rawle, 275; Vaughan *v.* Menlove, 3 Bing. N. C. 468.

[3] See Doorman *v.* Jenkins, 2 Adolph. & Ellis, 256; Vaughan *v.* Menlove, 3 Bing. N. C. 468, 475.

[4] See Vaughan *v.* Menlove, 3 Bing. N. C. 468, 475; Batson *v.* Donovan, 4 Barn. & Ald. 21, 30.

§ 13. It is important to attend to this consideration, not merely to deduce the implied obligations of a bailee in a given case, but also to possess ourselves of the true measure, by which to fix the application of the general rule. Thus, in times of primitive or pastoral simplicity, when it is customary to leave flocks of sheep to roam at large by night, it would not be a want of ordinary diligence to allow a neighbor's flock, which is deposited with us, to roam in the same manner. But, if the general custom were to pen such flocks at night in a fold, it would doubtless be a want of such diligence, not to do the same with them. In many parts of America, especially in the interior, where there are, comparatively speaking, few temptations to theft, it is usual to leave barns, in which horses and other cattle are kept, without being under lock by night. But in our cities, where the danger is much greater, and the temptations more pressing, it would be deemed a great want of caution to act in the same manner. If a man were, in many country towns, to leave his friend's horse in his field or in his open barn all night, and the horse were stolen, it would not be imagined that any responsibility was incurred. But if in a large city the same want of precaution were shown, it would be deemed in many cases a gross neglect. If robbers were known to frequent a particular district of country, much more precaution would be there required, than in districts where robberies were of very rare occurrence. What, then, is usually done by prudent men in a particular country in respect to things of a like nature, whether it be more or less in point of diligence, than what is exacted in another country, becomes, in fact, the general measure of diligence.

§ 14. And the customs of trade and the course of business have also an important influence. If, in the course of a particular trade, particular goods, as, for instance, coals, are usually left on a wharf without any guard or protection during the night, and they are stolen, the wharfinger, or other person having the custody, might not be responsible for the loss, although for a like loss of other goods, not falling under a like predicament, he might be responsible. If a chaise were left during the night under an open shed, and were stolen, the bailee might not be liable for the loss, if such was the usual practice

of the town or place; and yet he might be liable, if greater precautions were there usually taken. In short, diligence is usually proportioned to the degree of danger of loss; and that danger is, in different states of society, compounded of very different elements. Men intrusted with money might at some times and in some places be required to go armed; when, at other times and in other places, such a precaution would be deemed wholly unnecessary.

§ 15. And what constitutes ordinary diligence may also be materially affected by the nature, the bulk, and the value of the articles.[1] A man would not be expected to take the same care of a bag of oats, as of a bag of gold; of a bale of cotton, as of a box of diamonds, or other jewelry; of a load of common wood, as of a box of rare paintings; of a rude block of marble, as of an exquisitely sculptured statue. The value, especially, is an important ingredient to be taken into consideration upon every question of negligence; for that may be gross negligence in the case of a parcel of extraordinary value, which in the case of a common parcel would not be so. The degree of care, which a man may reasonably be required to take of any thing, must, if we are at liberty to consult the dictates of common sense, essentially depend upon the quality and value of the thing, and the temptation thereby afforded to theft. The bailee, therefore, ought to proportion his care to the injury or loss, which is likely to be sustained by any improvidence on his part.[2] But this, as well as some other considerations, touching the degree of diligence, will properly find a place in other parts of our inquiry.[3]

§ 16. Having thus ascertained the nature of ordinary diligence, we may now be prepared to decide upon the other two degrees. High, or great diligence is of course extraordinary diligence, or that, which very prudent persons take of their own concerns; and low, or slight diligence is that, which persons of

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[1] Jones on Bailm. 38, 39.

[2] Batson *v.* Donovan, 4 Barn. & Ald. 21, 36, 42; Sleat *v.* Flagg, 5 Barn. & Ald. 342; Nelson *v.* Mackintosh, 1 Stark. R. 238; Steamboat New World *v.* King, 16 Howard, U. S. R. 475.

[3] Post, § 186.

less then common prudence, or indeed of any prudence at all, take of their own concerns.[1] Sir William Jones considers the latter to be the exercise of such diligence, as a man of common sense, however inattentive, takes of his own concerns.[2] Perhaps, this is expressing the measure a little too loosely; for a man may possess common sense, nay, uncommon sense, and yet be so grossly inattentive to his own concerns, as to deserve the appellation of having no prudence at all. The measure is rather to be drawn from the diligence, which men, habitually careless, or of little prudence (not "however inattentive" they may be), generally take in their own concerns.

§ 17. Having, then, arrived at the three degrees of diligence, we are naturally led to those of negligence, which correspond thereto; for negligence may be ordinary, or less than ordinary, or more than ordinary. Ordinary negligence may be defined to be the want of ordinary diligence, and slight negligence to be the want of great diligence, and gross negligence to be the want of slight diligence.[3] For he, who is only less

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[1] See Vaughan *v.* Menlove, 3 Bing. N. C. 468, 475.

[2] Jones on Bailm. 8. Mr. Justice Duncan, in delivering the opinion of the Court in Tompkins *v.* Saltmarsh, 14 Serg. & Rawle, 275, follows the doctrine and language of Sir William Jones. He says a gratuitous bailee "is only liable for gross negligence, *dolo proximus*, a practice equal to fraud. It is that omission of care, which even the most inattentive and thoughtless men never fail to take of their own concerns."

[3] In some modern cases, a doubt has been intimated whether these nice distinctions in the different degrees of negligence are useful or practicable. Thus, in Wilson *v.* Brett, 11 Meeson & Welsby, 113, Baron Rolfe declared he could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet. And in another case, — Hinton *v.* Dibbin, 2 Queen's Bench, 650, — Lord Denman said: "It may well be doubted whether between gross negligence and negligence merely, any intelligible distinction exists." And this remark was cited with approbation by Cresswell, J., in the late case of Austin *v.* The Manchester Railway Co., 11 Eng. Law & Eq. R. 513. See Cashill *v.* Wright, 6 Ell. & Bl. 897. In Steamboat New World *v.* King, 16 Howard, 474, Curtis, J., said: "The theory that there are three degrees of negligence, described by the terms slight, ordinary, and gross, has been introduced into the Common Law from some of the commentators on the Roman Law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it

diligent than very careful men, cannot be said to be more than slightly inattentive; he, who omits ordinary care, is a little more negligent than men ordinarily are; and he, who omits even slight diligence, fails in the lowest degree of prudence, and is deemed grossly negligent.[1] In strictness of speech, as

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is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation. In Storer *v.* Gowen, 18 Maine, R. 177, the Supreme Court of Maine say: 'How much care will, in a given case, relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending on a great variety of circumstances which the law cannot exactly define.' Mr. Justice Story (Bailments, § 11) says: 'Indeed, what is common or ordinary diligence is more a matter of fact than of law.' If the law furnishes no definition of the terms gross negligence, or ordinary negligence, which can be applied in practice, but leaves it to the Jury to determine, in each case, what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty, had better be abandoned. Recently the Judges of several courts have expressed their disapprobation of these attempts to fix the degrees of diligence by legal definitions, and have complained of the impracticability of applying them. Wilson *v.* Brett, 11 Mees. & Welsb. 113; Wylde *v.* Pickford, 8 Ib. 443, 461, 462; Hinton *v.* Dibbin, 2 Q. B. 646, 651. It must be confessed that the difficulty in defining gross negligence, which is apparent in perusing such cases as Tracy et al. *v.* Wood, 3 Mason, 132, and Foster *v.* The Essex Bank, 17 Mass. R. 479, would alone be sufficient to justify these complaints. It may be added that some of the ablest commentators on the Roman Law, and on the Civil Code of France, have wholly repudiated this theory of three degrees of diligence, as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties. See Toullier's Droit Civil, 6th vol. p. 239, &c.; 11th vol. p. 203, &c. Makeldey, Man. Du Droit Romain, 191, &c." But notwithstanding these remarks, it cannot be doubted, that there *are* different degrees of negligence, although the dividing line between them may be narrow, and it may not always be easy to say on which side of the line a particular case may fall. It is possible, too, that no uniform meaning has always been ascribed to the words "gross negligence," and the term has sometimes been loosely applied to carriers for hire, whereas it is more correctly used in describing that degree of negligence for which a gratuitous bailee is responsible. But the existence of a practicable difference between the degrees of negligence lies at the foundation of the law of bailments.]

[1] Jones on Bailm. 8, 9. [In the language of Parsons, "A bailee is *always responsible* for the property delivered to him; *but the degree and measure* of

has been well observed by Pothier,[1] negligence is not permitted in any contract; but a less rigorous construction prevails in some cases, than in others. The law considers diligence to be, in some sort, a relative term; and it must be judged of from the nature of the bailment, and from all the other ingredients which may fairly be presumed to enter into the contemplation of the parties. He, who asks a favor, has no right to expect to be absolved from a proportionate care; and he, who accepts a burden, has a right to presume, that he will not be required to be as scrupulously exact, as if he received a benefit.

§ 18. The view, which has thus been taken of the various degrees of diligence required by the common law, is in perfect conformity to that which the Civilians have laid down. And, indeed, it is almost impossible to escape from the conclusion, that our law is mainly a derivative from that source. In the civil law, there are three degrees of diligence, ordinary diligence, *diligentia;* extraordinary diligence, *exactissima diligentia;* and slight diligence, *levissima diligentia.* In like manner, there are three degrees of fault or neglect; *lata culpa*, gross fault or neglect; *levis culpa*, ordinary fault or neglect; *levissima culpa*, slight fault or neglect; and the definitions of these degrees are precisely the same with those in our law.[2] *Qui enim eam non adhibent diligentiam, quam solent patres familias ad rem attentissimi, culpam levissimam; qui omittunt diligentiam, a frugi patre familias adhiberi solitam, levem; qui, denique, ne eâ quidem diligentiâ, quâ omnes, etiam dissoluti homines, uti solent, utuntur, latam committere dicuntur.*[3]

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this responsibility vary from one extreme to another. He is bound to *take care* of the property; but the question always occurs, *what care?*" — Parsons on Contracts, Vol. I. p. 570.]

[1] Jones on Bailm. 30. The passage in Pothier, here referred to, was originally published at the end of his Treatise on Marriage, and is contained in a dissertation, entitled "Observation Générale sur le precedent Traité, et sur les suivans." It will now be found published at the end of Pothier's Treatise on Obligations, in the 4to edition of his works, printed at Orleans in 1781, vol. 1, pp. 455 to 459, and the particular passage cited is at p. 458; and in the Paris edition of his works by Dupin, in 8vo, 1824, vol. 1, p. 542 to 549, and the particular passage at p. 546.

[2] Wood, Inst. B. 1, ch. 1, p. 106; Halifax, Civ. Law, ch. 14, p. 61.

[3] Heinec. Elem. Jur. Inst. Lib. 3, tit. 14, § 787; Dig. Lib. 50, tit. 16, § 223, 226; Dig. Lib. 19, tit. 2, § 25, 7; Vinnius ad Inst. Lib. 3, tit. 15, § 12, 13.

§ 19. In respect to gross negligence, it is often said, that it is equivalent to fraud, and is evidence of fraud. That it may, in certain cases, afford a presumption of fraud, and, indeed, that in very gross cases it may approach so near, as to be almost undistinguishable from it, may be admitted, especially when the facts seem hardly consistent with any honest intention. But that generally gross negligence and fraud are convertible terms, is a doctrine not supported by any just inference from the authorities in the common law.

§ 20. Sir W. Jones, indeed, in various passages of his Essay, seems to inculcate a different doctrine, and to put gross negligence by the side of fraud, and as equivalent to it. Thus, he speaks of ordinary negligence, as "a mean between fraud and accident;"[1] of gross negligence, as being inconsistent with good faith;[2] and of a bailee, without reward, being "answerable only for fraud, or for gross neglect, which is considered evidence of it."[3] There are other passages again, in which he seems to indicate a clear distinction between them,[4] although the general course of his reasoning leans the other way. His great respect for the civil law, and his desire to assimilate the doctrines of the common law to it, may, perhaps, somewhat have influenced his judgment. He admits, that in the Roman Law "gross neglect, *lata culpa*, as the Roman lawyers most accurately call it, *dolo proxima*, is in practice considered as equivalent to *dolus*, or fraud itself."[5] *Lata culpa plane dolo comparabitur.*[6] He is certainly warranted in this remark by the opinion of many Civilians; for they, in their definitions of the words, *dolus*, *culpa*, and *casus*, leave little room to doubt, that they understood such to be the true meaning of *dolus* in the Roman Law. *Dolus est omnis calliditas, fallacia, machinatio ad decipiendum, fallendum, circumvenien-*

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[1] Jones on Bailm. 8.

[2] Jones on Bailm. 10, 46, 119.

[3] Jones on Bailm. 46.

[4] Jones on Bailm. 8, 9, 47, 120.

[5] Jones on Bailm. 21, 22; Id. 14, 15; Dig. Lib. 13, tit. 6, l. 5, § 2; Dig. Lib. 50, tit. 17, l. 23.

[6] Dig. Lib. 11, tit. 6, l. 1. § 1. See also, Dig. Lib. 44, tit. 7, l. 1, § 5.

dum, alterum adhibita. Culpa, factum inconsultum, quo alter læditur, vel quod, quum a diligente provideri potuerit, non sit provisum. Casus est eventus a divinâ providentiâ profectus, cui resisti non potest.[1]

§ 20 *a*. But after all, it may admit of question, whether in the Roman Law the word *dolus* was used in the intense sense of the word *fraud* (that is, intentional fraud), in our law, or whether it meant any thing more than a breach of that good faith, which is required by law of the bailee, and thus approached nearer to what we are accustomed to call constructive fraud, or such acts or omissions as operate as a deception upon the other party, or violate the just confidence reposed by him, whether there be a deceitful intent, *malus animus*, or not. Pothier manifestly understands the word *dolus*, in the Roman Law, in this last more mitigated sense; for he says, it is not to be doubted, that a depositary is liable for the loss or deterioration of things confided to him, when caused by his gross negligence: because, such negligence being contrary to the good faith requisite in a deposit, it is comprised under the term of fraud, and of default of good faith (*sous le terme de dol, et de defaut de bonne foi*), for which the Roman Law declares the depositary responsible.[2] And there certainly are various texts of the Roman Law, which scarcely admit of any other reasonable interpretation than what belongs to this mitigated sense.[3] Even in the Roman Law, a stipulation, that the depositor should rely solely on the good faith of the depositary for the return of the deposit, without resorting to any action, was held valid; while a stipulation, that the depositary should not be liable for his own fraud (*dolus*) was held void.[4]

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[1] Heinec. Elem. Jur. Inst. Lib. 3, tit. 14, § 784; Wood, Inst. B. 1, ch. 1, p. 100; Vinn. ad. Inst. Lib. 3, tit. 25, § 12; Dig. Lib. 50, tit. 16, § 223, 226; Dig. Lib. 11, tit. 6, l. 1, § 1; Dig. Lib. 13, tit. 6, l. 5, § 2.

[2] Pothier, Traité de Dépôt, n. 23; Id. n. 27. Pothier in other places manifestly understands the word "dolus" of the civil law in the same mitigated sense. Pothier, Contrat de Mandat. n. 211; Dig. Lib. 13, tit. 6, l. 5, § 2; Dig. Lib. 50, tit. 17, l. 23; Pothier, Pand. Lib. 16, tit. 3, n. 25; Post, § 65.

[3] Pothier, Pand. Lib. 16, tit. 3, n. 16 to n. 25; Post, § 65.

[4] Dig. Lib. 16, tit. 3, l. 1, § 7; Dig. Lib. 2, tit. 14, l. 7, § 15; Id. l. 27, § 3; Pothier, Pand. Lib. 16, tit. 3, n. 25; Id. Lib. 2, tit. 14, n. 59; Pothier, Traité

§ 20 *b*. The Roman lawyers themselves do not seem to have been altogether agreed on this point; for while Nerva maintained that gross negligence was fraud, Proclus was dissatisfied with the doctrine; and Celsus, in giving his approbation to the opinion of Nerva, says: *Quod Nerva diceret, latiorem culpam dolum esse, Proclo displicebat; mihi verissimum videtur.*[1] And a distinction seems to have been taken in the Roman Law between *dolus* and *dolus malus*. *Magna negligentia culpa est* (says the Digest), *magna culpa dolus est.*[2] *Dolum malum Servius quidem ita definit, machinationem alterius, decipiendi causâ, cum aliud simulatur, et aliud agitur. Labeo autem posse et sine simulatione id agi, ut quis circumveniatur, &c. Itaque ipse sic definit dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum, alterum adhibitum. Labeonis definitio vera est.*[3]

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de Dépôt, n. 24, 25, 26, 27. Pothier's explanation of these different stipulations will not perhaps be thought very satisfactory. But if the former stipulation be construed to mean, that the depositary shall not be held liable for any negligence, however gross, where he acted honestly, and without intentional fraud, it would be very intelligible.

[1] Dig. Lib. 16, tit. 3, l. 32; Pothier, Pand. Lib. 16, tit. 3, n. 25.

[2] Dig. Lib. 50, tit. 16, l. 226.

[3] Dig. Lib. 4, tit. 3, l. 1, § 2. There is a very acute and sound criticism upon this subject in the English Monthly Law Magazine, for May, 1839, p. 292, 293, and note, ibid. Ayliffe, in his Pandects (B. 2, tit. 23, p. 108, 109, 110), has given an elaborate view of the different sorts of fault or negligence, and fraud and deceit. The passage is long; but as it contains a very ample view of the opinions of the Civilians, I have thought, that it might be useful to place it in a note. "The word fault, in Latin called culpa, is a general term; and, according to the definition of it, it denotes an offence or injury done unto another by imprudence, which might otherwise be avoided by human care. For a fault, says Donatus, has a respect unto him, who hurts another not knowingly or willingly. Here we use the word offence or injury by way of a genus, which comprehends deceit, malice, and all other misdemeanors, as well as a fault. For deceit and malice are plainly intended for the injury of another, but a fault is not so designed. And, therefore, we have added the word imprudence in this definition, to point out and distinguish a fault from deceit, malice, and an evil purpose of mind which accompanies all trespasses and misdemeanors. A fault arises from simplicity, a dulness of mind, and a barrenness of thought, which is always attended with imprudence; but deceit, called dolus, has its rise from a malicious

§ 21. Perhaps Sir William Jones did not intend to use the word *fraud*, in its intense sense, but only to use it as equiva-

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purpose of mind, which acts in contempt of all honesty and prudence, with a full intent of doing mischief or an injury. And by these last words in the definition, namely, which might otherwise be avoided by human care, we distinguish a fault from a fortuitous case. For a fault is blamable through want of taking proper care; and it obliges the person that does the injury; because by an application of due diligence it might have been foreseen and prevented. But fortuitous cases often cannot be foreseen, or (at least) prevented by the providence of man; as death, fires, great floods, shipwrecks, tumults, piracies, &c. Those things are superior to the prudence of any man, and rather happen by fate, therefore are not blamable. But if fraud or some previous fault be the occasion of these nocuments, they are not then deemed to be fortuitous cases. A fault is a deviation from that which is good; and, according to Bartolus, erring from the ordinance and disposition of a law. It is sometimes difficult to judge what is the difference betwixt a fault and a dolus, since these words very often stand for one and the same thing. There is no one in this life lives without a fault; but he, that would speak distinctly and properly, must impute a dolus to some wickedness or knavery, and a fault to imprudence. The first consists chiefly in acting, and the other in not acting or doing something which a man ought to do. According to Bartolus, a fault is divided into five species, namely, culpa latissima, latior, lata, levis, and levissima. The first he makes to be equal to manifest deceit; and the second to be equivalent unto presumptive malice or deceit. The first and second of these distinctions (he says) approach unto fraud, and are sometimes called by the name of fraud. But a lata culpa, which is occasioned by gross sloth, rashness, improvidence, and want of advice, is never compared unto deceit or malice. For he that understands not that, which all other men know and understand, may be styled (says Bartolus) a supine and unthinking man, but not a malicious and deceitful person. But, I think, none of those distinctions of his have any foundation in law; for such things as admit of any degree of comparison, in respect of being more or less so, do not admit of any specific difference; as magis et minus diversas species non constituunt. For that, which the law says de latiore culpâ, sometimes is to be understood de latâ culpâ, after the manner, that a word of the comparative degree is sometimes put for a word of the positive, as in Virgil:

Tristior et lacrymis oculos suffusa nitentes.

Wherefore, I shall here distinguish a fault into two species only, namely, into lata and levis, though others mention a culpa levissima too. The first denotes a negligence extremely blamable; that is to say, such a negligence as is not tempered with any kind of diligence. The other imports such a kind of negligence, whereby a person does not employ that care in men's affairs, which other men are wont to do, though he be not more diligent in his own business. But as often as the word culpa is simply used in the law, it is taken for that which we style

lent to a breach of good faith, or to a gross breach of duty, operating as a constructive fraud on the bailee. Thus, in his synthetical arrangement of the doctrine of bailments, he says: "A depositary is responsible only for gross neglect, or, in other words, for a violation of good faith."[1] If, however, he is to be understood as maintaining, that in the common law there is no distinction between gross negligence and actual or intentional fraud, he is certainly under a mistake; and the error requires correction, since many cases may arise, in which the difference may be material. One is put by Sir William Jones

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culpa levis, a light fault, because words are ever understood in the more favorable sense. A culpa levissima, or simple negligence, is that, which proceeds from an unaffected ignorance and unskilfulness (say they) and it is like unto such a fault, which we easily excuse, either on the account of age, sex, rusticity, &c. Or to set the matter in a clearer light, a lata culpa is a diligence in a man's own affairs, and a negligence in the concerns of other men. And a levis culpa is, when a man employs the same care or diligence in other men's affairs, as he does in his own; but yet does not use all care and fidelity, which more diligent and circumspect men are wont to make use of; and this may be called an accustomed negligence, as well in a man's own affairs, as in the business of other men. A lata culpa, I mean a great fault, is equivalent, or next unto deceit or malice. And it may be said to be next unto deceit or malice two ways, namely, either because it contains in it a presumptive deceit, as when a man does not use the same diligence in another's concerns, as in his own; or else because the fault is so gross and inexcusable, that, though fraud be not presumed, yet it differs but little from it. As when a person becomes negligent in favor of a friend; for though favor, or too great a facility of temper, excuses a man from a malicious or knavish purpose, yet it is next of kin thereunto. And it is a rule laid down in law, that when the law commands any act of deceit to be made good, it is also always understood of a lata culpa, or gross fault. Wherefore, since a great fault is equivalent, or next unto deceit, it follows, that in every disposition of law, where it is said that evil intent or dolus ought only to be repaired, it is to be understood also of a lata culpa; which is true, I think, unless it be in the Cornelian law de Sicariis. For he who commits the crime of murder ex latâ culpâ, shall be punished according to the severity of that law, but in a more gentle manner; and thus herein a late culpa is distinguished from malice, or an evil design, called dolus malus; for a murderer is liable on the score of his wicked purpose, and not on the account of gross negligence. Some say, that generally speaking, whenever the law or an action is touching a pecuniary penalty, and the law expressly mentions a dolus, a lata culpa is insufficient, and is excluded."

[1] Jones on Bailm. 120.

himself; that if a depositary commit a gross neglect in regard to his own goods, as well as to those which are bailed to him, by which both are lost or damaged, he cannot be said to have violated good faith; and the bailor must impute to his own folly the confidence which he reposed in so improvident and thoughtless a person.[1] So, where a cartoon was left in the hands of an auctioneer, without any particular agreement to take care of it, or redeliver it safe, and without any agreement for a reward, and it appeared, that the painting was upon paper, pasted on canvas, and that the bailee kept it in a room next to a stable, in which there was a wall, which had made it damp and peel, it was held to be gross neglect, and the bailee was made responsible, although there was no imputation of intentional fraud.[2]

§ 22. These cases sufficiently show, that the doctrine, that gross negligence is equivalent to fraud, cannot be maintained as a general result of the common-law authorities.[3] On the contrary, gross negligence is, or, at least, may be, entirely consistent with good faith and honesty of intention. And it would be a most mischievous error to confound it with fraud; for, then, unless a jury should believe the party guilty of fraud, no laches would come up to the legal notion of gross negligence, so as to entitle the sufferer by the loss to a recovery. A man might leave a casket of jewels, or a purse of gold, upon the table of a public room at an inn, or might leave a large package of bank-bills, in a great coat, in the common entry of an inn, from pure thoughtlessness; and a jury might be well satisfied, that it was gross negligence.[4] But if fraud were a necessary ingredient, the very statement of the case would negative any right of recovery. The law, however, does not necessarily include, in the notion of gross negligence, any admixture of fraud, or at least not of intentional fraud, although in argument

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[1] Jones on Bailm. 47.

[2] Mytton v. Cock, 2 Str. 1099. See also, Batson v. Donovan, 4 Barn. & Ald. 21; Clarke v. Earnshaw, 1 Gow, R.

[3] Jones v. Smith, 1 Hare, R. 71; Wilson v. Y. & M. Railroad Co. 11 Gill & Johnson, 58.

[4] See Tompkins v. Saltmarsh, 14 Serg. & R. 275, 280; Jones on Bailm. 38.

that is sometimes urged, with a view to relieve the defence from the pressure of other facts.[1]

§ 23. Having, then, ascertained the nature and various degrees of diligence and negligence, it is next to be considered, in what manner the law applies them to the different sorts of bailments. And, here, the doctrine adopted in the common law seems at once rational, just, and convenient. When the bailment is for the sole benefit of the bailor, the law requires only *slight* diligence on the part of the bailee, and of course makes him answerable only for *gross* neglect. When the bailment is for the sole benefit of the bailee, the law requires *great* diligence on the part of the bailee, and makes him responsible for *slight* neglect. When the bailment is reciprocally beneficial to both parties, the law requires *ordinary* diligence on the part of the bailee, and makes him responsible for *ordinary* neglect.[2]

§ 24. A like division of the degrees of responsibility is to be found in the civil law. *In contractibus* (says Heineccius), *in quibus penes unum commodum, penes alterum incommodum est, ille ordinarie culpam etiam levissimam, hic, non nisi latam, præstat. Ubi par utriusque contrahentis commodum atque incommodum est, culpa etiam levis ab utroque præstanda est.*[3] The same rules are found in the French law;[4] and in the Scotch law;[5] and they may be deemed the general result of the jurisprudence of Continental Europe.

§ 25. It follows, as a natural consequence, from these principles, that bailees in general are not responsible for losses

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[1] Post, § 32; Vaughan *v.* Menlove, 3 Bing. N. C. 468, 475. In Tompkins *v.* Saltmarsh, 14 Serg. & R. 275, Mr. Justice Duncan said: "One, who was bound to ordinary diligence, and suffered the goods to be taken by stealth out of his custody, was held by Sir William Jones not to have used ordinary diligence; *but a contrary practice now prevails.*"

[2] Jones on Bailm. 10, 119; Coggs *v.* Bernard, 2 Ld. Raym. 919; Pothier, Traité de Dépôt, n. 23.

[3] Heinec. Elem. Jur. Inst. Lib. 3, tit. 14, § 788; Wood, Inst. B. 1, ch. 1, p. 107; Vinn. ad. Inst. Lib. 3, tit. 15, § 12.

[4] Pothier, Oblig. P. 1, ch. 2, art. 1, § 1, n. 141, 142.

[5] Ersk. Inst. B. 3, tit. 1, § 21, p. 488; 1 Bell, Comm. § 411, 4th edit.; 1 Bell, Comm. p. 453, 5th edit.

resulting from inevitable accident, or from irresistible force, although they may become so liable by special contract, or (as we shall hereafter see) by some positive policy of the law. By inevitable accident, commonly called the act of God, is meant any accident produced by any physical cause, which is irresistible; such as a loss by lightning or storms, by the perils of the seas, by an inundation or earthquake, or by a sudden death or illness. By irresistible force is meant such an interposition of human agency, as is, from its nature and power, absolutely uncontrollable. Of this nature are losses occasioned by the inroads of a hostile army, or, as the phrase commonly is, by the king's enemies, that is, by public enemies. In the same manner, losses occasioned by pirates are deemed irresistible, and by hostile force;[1] for pirates are deemed the enemies of the whole human race (*hostes humani generis*); and by the common consent of nations, they are, when taken, everywhere punished with death.[2] By the law of nations they are esteemed outlaws, and their crimes, against whomsoever committed, are punishable in the courts of any nation, within whose criminal jurisdiction they are brought.

§ 26. Robbery by force is also deemed irresistible. Robbery (*rapina*) is in the civil law defined to be the violent taking from the person of another of money or goods for the sake of gain.[3] The definition of the common law does not materially differ; for, in that law, it is defined to be the felonious taking from the person of another, or, in his presence, against his will, of goods or money to any value, by force or violence, or by putting him in fear.[4] And, whether such robbery be by robbers on the highway, or by breaking open a house, and assaulting the inmates, makes no difference. The acts of such banditti are considered irresistible.[5] In like manner, in cases

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[1] Abbott on Ship. Pt. 4, ch. 5, § 2, 3. See the Magellan Pirates, 25 Eng. Law & Eq. R. 595.

[2] United States *v.* Smith, 5 Wheat. R. 153, 161, and note; Id. 163.

[3] Halifax, Anal. Civ. Law, ch. 23, p. 79; Inst. Lib. 4, tit. 2; Wood, Inst. Civ. Law, B. 3, ch. 7, p. 257.

[4] 4 Bl. Comm. 243; 2 East, Pl. Cr. ch. 16, § 124, p. 707.

[5] Jones on Bailm. 44, 119; 10 Hen. 6, 51, pl. (3). See also, Jones on Bailm. 40, 79; Lib. Assisarum, An. 29, pl. 28.

of insurance, the maritime law deems a loss by sea robbers, or pirates, to be loss by irresistible force. *Si furtum committatur in mari per piratas et latrones, et tunc inter casus fortuitos connumeratur*, is the language of Roccus.[1] We shall have occasion, hereafter, to notice an exception, not to the principle of the rule, but to its application by the common law, in the case of common carriers.

§ 27. But a loss by a mere private or secret theft is not deemed to be irresistible;[2] and whether it excuses the party,

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[1] Roccus de Assecur. n. 41.

[2] Roccus de Assecur. n. 42; Marsh. Insur. B. 1, ch. 7, § 4, p. 243; [Marshall *v.* Nashville Marine & Fire Ins. Co. 1 Humph. 99; De Rothschild *v.* The Royal Mail Steam Packet Co. 14 Eng. Law & Eq. R. 327; 7 Exch. 734. Parke, B., said: "In this case the plaintiffs sought to recover from the defendants the value of two boxes of gold dust, part of eleven received by them at Panama, to be carried to the Bank of England. The defendants carried the goods from Panama across the Isthmus by land, shipped them at Chagres, and brought them by steam vessels to Southampton, and thence carried them by the London and Southwestern Railway to London. The bill of lading was given by them at Panama, acknowledging the receipt of eleven packages, said to contain 7,000 and odd ounces of gold dust to be carried to the Bank of England — 'the act of God, the queen's enemies, robbers, fire, accidents from machinery, boilers, steam, dangers of the sea, roads, and rivers, of whatsoever nature or kind, excepted.' All the packages arrived safely at Southampton, and were placed on the railroad to be carried to London, but one of them was stolen secretly from the railway truck before their arrival there, and the jury found that the defendants were guilty of negligence in the conveyance of them to London, which caused the loss.

"The defendants pleaded the exceptions in the bill of lading in two different pleas, one stating that the loss was occasioned by robbers, the other by dangers of the roads. At the trial, both pleas were found for the defendants, but with a reservation of liberty to enter the verdict on both for the plaintiffs. A rule *nisi* having been granted, the case on behalf of the defendants was elaborately and fully argued during the last term. Sir Alexander Cockburn was heard in part for the plaintiffs. Being satisfied that the plaintiffs are entitled to recover, we do not think it necessary to hear any further arguments upon the subject. The question is, whether the theft committed on the Southwestern Railway was, first, an act of robbers; secondly, was it a danger of roads within the true meaning of the bill of lading? and we are of opinion that it was neither the one nor the other. It was argued, for the plaintiffs, that the word 'robbers' ought not to be construed in the technical sense given to the word by the English law writers, and by some of the English statutes, — the 1 Vict. c. 87, s. 2, for instance, where it means a felonious taking from the person in the presence

or not, depends upon the nature of the bailment, and the particular circumstances of the case.[1] If the proper degree of diligence has been used by the bailee, and, notwithstanding

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of another, of money, or goods, against his will by force, and putting him in fear; for it was not likely that a robbery in that sense would occur, as the packages were not in the personal presence of the defendants or their servants, and still less were they upon their persons. Other statutes were cited where the meaning is much more comprehensive, and includes the taking without force. Besides, in construing such instruments, it was contended that the ordinary meaning of the words used must be followed. We think that position is correct, but we must also look at the circumstances under which the contract was made, and the peculiar subject to which it applied; and taking these into consideration, we cannot doubt that the meaning of the contract was, that the defendants were not to be liable for the loss of the gold dust in instances where it was taken by force by a *vis major* which they, the defendants, could not resist, but that they were to be liable where it was pilfered from them or taken by stealth. It is very unreasonable to suppose that the shippers of a very precious article, of which a large value is comprised in a very small space, which is capable of being easily abstracted by any person employed in carrying it, meant to exempt the persons to whom they gave the custody and care of it from all responsibility for theft committed by their crew, or others, against whom presumably they could guard by the exercise of reasonable care; but it is likely that they should agree to exempt where the goods were taken by a force which they could not resist. The nature of the transaction shows clearly, therefore, that the word 'robbers' means, not 'thieves,' but robbers by force, to whom the term is more usually applied, although in common parlance it is often applied to every description of theft. It is explained also by the word with which it is associated, 'pirates,' who certainly take by force and not by stealth. We have no doubt, therefore, in this bill of lading, that this is the proper meaning of the word 'robbers,' and this being so, the loss in this case was not by robbers, and that the plea in which the loss was so stated ought to be found for the plaintiffs.

"We do not feel any difficulty as to the meaning of the term 'dangers of the roads.' We think the word 'roads' may be explained by the context to mean marine roads in which vessels lie at anchor; or suppose it means roads on land, the dangers of the roads are those which are immediately caused by roads, as the overturning of carriages in rough and precipitous places. The losses by robbers are already provided for under the general term 'robbers.' The same reason which induces us to believe the parties did not mean the defendants should not be exempted from pilfering by thieves where loss by robbers is excepted, leads us to the conclusion that they did not intend they should be protected in the case of loss by thieves in passing along roads. Our judgment will, therefore, be for the plaintiffs."]

[1] Clarke *v.* Earnshaw, 1 Gow, N. P. Rep. 30.

that, a loss by such theft ensues, he is not responsible. There are also exceptions to this rule, which will be taken notice of hereafter.[1]

§ 28. Whether a loss occasioned by the forcible breaking open of a house by robbers, or bandits, during the temporary absence of the family, would be deemed a loss by irresistible superior force, does not appear to have been directly settled in our law. Bonion's case,[2] whether it be law or not, does not come up to the doctrine. And Sir William Jones[3] states, that, in case of a loss by burglary, no bailee can be responsible without a very special undertaking; but he cites no authority on the point. He doubtless intends to speak of that crime in its technical sense, which supposes an actual occupation of the house, as a mansion, or, at least, if the family is absent, that it is so *animo revertendi*.[4] Pothier considers a loss by forcibly breaking open a house to be a loss by irresistible force.[5]

§ 29. Our own Bracton enumerates among casualties, fire, the ruin or fall of edifices, shipwreck, robbery, and hostile incursions; for, speaking of certain cases, in which a bailee may be responsible for casualties, he says: *Si forte incendio, ruinâ, naufragio, aut latronum vel hostium incursu, consumpta fuerit vel deperdita, subtracta, vel ablata.*[6]

§ 30. In the civil law, in which parties are not generally liable for accidents, unless they expressly stipulate to be so liable, there are included under the head of accidents, not only losses by lightning, inundation, torrents, shipwreck,[7] and other perils of the sea, but also losses by fire, robbery, hostile incursions, insurrections, and piracies.[8] *Animalium, vero* (says the Digest), *casus, mortes, quæque sine culpâ accidunt, fugæ servorum, qui custodiri non solent, rapinæ, tumultus, incendia, aqua-*

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[1] See Marshall on Insur. B. 1, ch. 7, § 4, p. 243; Roccus de Assecur. note 42; Post, § 489.

[2] Mayn. Year Book, 275; Fitz. Ayr. Detinue, 59.

[3] Jones on Bailm. 39.

[4] 4 Black. Comm. 223; 2 East, Pl. Cr. ch. 15, § 11, p. 496.

[5] Pothier, Traité du Prêt à Usage, n. 53.

[6] Bracton, Lib. 3, ch. 2, p. 99.

[7] Dig. Lib. 4, tit. 9, l. 3, 1.

[8] Dig. Lib. 4, tit. 9, l. 3, 1.

rum magnitudines, impetus prædonum, a nullo præstantur.[1] Vinnius enumerates them somewhat more in detail. *Casus fortuiti varii sunt, veluti a vi ventorum, terbinum, pluviarum, grandinum, fulminum, æstus, frigoris, et similium calamitatum, quæ cælitus immittuntur. Nostri vim divinam dixerunt; Græci Θεοῦ βίαν. Item naufragia, aquarum inundationes, incendia, mortes animalium, ruinæ ædium, fundorum chasmata, incursus hostium, prædonum impetus, &c., fugæ servorum, qui custodiri non solent. His adde damna omnia a privatis illata, quæ quominus inferrentur, nullâ curâ caveri potuit. Ad casus autem fortuitos non sunt referendi illi casus, qui cum culpâ conjuncti esse solent; cujusmodi sunt furta. Quamobrem, qui rem furto amissam vel incendio, verbi causâ servorum negligentiâ orto, consumptam dicit, is diligentiam suam probare debet. Quod vero incendium in alienis ædibus obortum occupat ædes vicinas, aut quod fulmine excitatur, aut a grassatoribus vel incendiariis immittitur, id inter casus fortuitos numerari debet.*[2]

§ 31. These principles, both in the civil and in the common law, are to be understood with this limitation, that there is no subsisting contract between the parties, which varies the general obligation resulting from them; for such contract, if it exists, governs the case, unless it be against public policy, or positive law.

§ 32. In respect to cases of loss by fraud, there is a salutary principle, belonging both to our law and the civil law. It is, that the bailee can never protect himself against responsibility for losses occasioned by his own fraud; nay, not even by a contract with the bailor, that he shall not be responsible for such losses. For the law will not tolerate such an indecency and immorality, as that a man shall contract to be safely dishonest. It, therefore, declares all such contracts utterly void; and holds the bailee liable, in the same manner, and to the same extent, as if no such contract ever existed.[3] *Non valet, si*

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[1] Dig. Lib. 50, tit. 17, l. 23; Dig. Lib. 13, tit. 6, l. 5, § 4.

[2] Vinn. ad Inst. Lib. 3, tit. 15, § 2, n. 5.

[3] Jones on Bailm. 11, 48; Doct. and Stud. Dial. 2, ch. 38; S. P. Alexander *v.* Green, 3 Hill (N. Y.), R. 9, 20. See Wells *v.* The Steam Navigation Co. 4 Selden, 375.

convenerit, ne dolus præstetur, says the Digest.[1] So says Heineccius. *Dolus semper et in omni contractu præstandus, nec conveniri potest in antecessum ut ne dolus præstetur.*[2] Now, it will occur at once to the reader, that, if the law be so, and if gross negligence be equivalent to fraud, there could be no defence set up by the bailee, founded upon his own conduct being the same in respect to his own goods as in respect to those deposited or founded upon a special contract not to be liable for gross negligence.[3] But, there is no principle in our law, that would prevent a depositary from contracting not to be liable for any degree of negligence, in which fraud is really absent. The maxim of our jurisprudence is, that *Modus et conventio vincunt legem;* and it applies to all contracts, not offensive to sound morals, or to positive prohibitions by the legislature.

§ 33. And here it may be proper to state, that, as the legal responsibility of a bailee (except perhaps in the case of common carriers),[4] may be narrowed by any special contract, either express or implied, so it may in like manner be enlarged.[5] Thus, if a depositary should specially contract to keep the deposit safely, he might be liable for ordinary negligence, although the law would otherwise hold him liable only for gross negligence. Upon this ground, Southcote's case [6] may, perhaps, be maintained to be good law, and not to be liable to the objection made against it in Coggs *v.* Bernard.[7] If, indeed, it proceeded upon the ground asserted by Lord Coke, that a bailment upon a contract to keep, and to keep safely, is the same thing, it certainly is not law, and was overruled in Coggs *v.* Bernard. But from the report it would seem, that the bailment was there

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[1] Dig. Lib. 50, tit. 17, l. 23; Dig. Lib. 2, tit. 14, l. 27, § 3; Wood, Inst. B. 1, ch. 1, p. 107; Vinn. ad. Inst. Lib. 3, tit. 15, § 12.

[2] Heinec. Elem. Jur. Inst. Lib. 3, tit. 14, § 785.

[3] Ante, § 20 to 23. See Penn. Railroad Co. *v.* McCloskey, 11 Harris, 526.

[4] Quere, — if *carriers* may so limit their responsibility, and see the New York case of Hollister *v.* Nowlen, 19 Wend. 234; Post, § 554, note 3; Cole *v.* Goodwin, 19 Wend. 251.

[5] Ames *v.* Belden, 17 Barbour, S. C. 515.

[6] 4 Co. R. 83, b.; 1 Inst. 89, a. b.

[7] 2 Ld. Raym. 909, 911.

to keep safe; and if so, then upon that special contract the party might have been held responsible, although he would not otherwise have been liable by the general law. This was the doctrine maintained by all the Judges, in the case of Coggs *v.* Bernard,[1] which case proceeded mainly upon this ground.[2] In a later case the same distinction was adopted by the Court; and it was held, that if a depositary should accept to keep safely, he would be responsible for losses by robbery or theft, although he would not otherwise be responsible upon the general principles of law.[3] [But modern cases have declared there is no difference between a carrier's general duty to carry, and his special contract to carry "safely and securely," because both are subject to such exceptions as the law will create.[4]]

§ 34. The rule of the civil law is on this point conformable to ours. *Si quid nominatim convenit* (is the language of that law), *vel plus vel minus in singulis contractibus, hoc servabitur, quod initio convenit; legem enim contractus dedit.*[5]

§ 35. To what extent a special agreement actually varies the obligations of the bailee, resulting from the general principles of law, must in a great measure depend upon the true exposition of the terms of the particular agreement. The general rule in such cases would seem to be, not to expound the contract unfavorably to the bailee beyond the obvious scope of its terms.[6] Sir William Jones thinks, that a depositary would not be liable for a loss of the goods by robbery, without a most express agreement.[7] St. Germain also holds, that, if a depositary promise to restore the goods safe at his peril, he is not responsible for casualties; but that it would be otherwise if he is to receive a reward.[8] Lord Holt, in Coggs *v.* Bernard,[9]

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[1] 2 Ld. Raym. 909.

[2] Jones on Bailm. 42 to 45.

[3] Kettle *v.* Brumsale, Willes, R. 118, 121.

[4] See Austin *v.* Manchester, &c., Railway, 5 Eng. Law & Eq. R. 329; 17 Q. B. 600; Shaw *v.* York & N. W. Railway Co. 13 Q. B. 347; Collett *v.* The London & Northwestern Railway Co. 6 Eng. Law & Eq. R. 305; 16 Q. B. 984.

[5] Jones on Bailm. 48; Dig. Lib. 50, tit. 17, l. 23; Dig. Lib. 17, tit. 1, l. 39.

[6] Post, § 512, 550. See Ames *v.* Belden, 17 Barbour, 517.

[7] Jones on Bailm. 44, 97, 98.

[8] Doct. and Stud. Dial. 2, ch. 38.

[9] 2 Ld. Raym, 909, 915, 918.

was of opinion, that upon a promise by a bailee without reward to keep or carry safely, he is not responsible for injuries or losses occasioned by the acts of wrongdoers;[1] and, *a fortiori*, that he is not responsible for a theft not caused by his own neglect. Robbery would, of course, in his opinion, exempt him from liability. Mr. Justice Powell, in the same case, thought that robbery would not be an excuse; and, of course, that theft would not;[2] because the bailee would have a remedy over against the robber. Mr. Justice Powys and Mr. Justice Gould seem to have agreed in opinion with Lord Holt.[3] Sir W. Jones holds, that in such a case the bailee would be responsible for a loss by theft, but not for a loss by robbery.[4] He manifestly founds himself upon the distinction taken in the civil law, that the attack of robbers is an irresistible force; but that of thieves may be guarded against by vigilance; *Impetus predonum a nullo præstantur.*[5] The reason given is, *quibus resisti non possit.*[6] But theft was not deemed to fall under the like consideration. *Quod si furibus subreptum sit, proprium ejus detrimentum est; quia custodiam præstare debuit, qui æstimatum accepit.*[7] Lord Chief Justice Willes, however, seems to have thought, that, upon such a special undertaking, even robbery would not be an excuse.[8] The civil law does not appear to go so far as to make a bailee liable for robbery upon such a contract,[9] although he would be liable for theft. Its language is: *Non enim dubitari oportet, quin is, qui salvum fore recipit, non solum a furto, sed etiam a damno recedere videatur.*[10]

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[1] Dig. Lib. 13, tit. 6, l. 19.

[2] 2 Ld. Raym. 911.

[3] 2 Ld. Raym. 909, 914.

[4] Jones on Bailm. 43, 44, 45, 98, 103.

[5] Jones on Bailm. 44, note (o); citing Goth. Com. in LL. Contractus, p. 145. The same commentary is given in Van Leeuwen's edition of the Digest, Lib. 17, tit. 2, l. 52, § 3, note 22, 24, edit. 1726; Dig. Lib. 50, tit. 17, l. 23; Dig. Lib. 13, tit. 6, l. 18; Dig. Lib. 17, tit. 2, l. 52, § 3; Post, § 38, 334, note.

[6] Dig. Lib. 13, tit. 6, l. 18.

[7] Dig. Lib. 17, tit. 2, l. 52, § 3, and the commentary in Van Leeuwen's edition, 1726.

[8] Kettle *v.* Bromsall, Willes, R. 121.

[9] Cod. Lib. 4, tit. 24, l. 6.

[10] Dig. Lib. 4, tit. 9, l. 5, § 1; Pothier, Pand. Lib. 4, tit. 9, n. 8; Post, § 37.

§ 36. In respect to losses occasioned by inevitable accident, such as by lightning, tempest, inundation, and other like unavoidable calamities, there are very respectable authorities, that, notwithstanding a special contract or undertaking to keep safely, the bailee will not be responsible for such losses. Sir W. Jones manifestly supported this doctrine.[1] It is sanctioned also by St. Germain in the passage above cited;[2] and was avowed by the Court in Coggs *v.* Bernard.[3] There are many cases in our law, where, if a contract or condition, possible at the time it was made, becomes afterwards impossible by the act of God, or of the law, the obligation or condition is discharged.[4] There are others, again, where a different doctrine is inculcated.[5] It is not easy to reconcile the cases, or to point out the different reasonings on which they proceed. In a leading case, the following distinction was taken: "Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and he hath no remedy over, there the law will excuse him; as in the case of waste, if a house be destroyed by tempest, or by enemies, the lessee is excused. But when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract. And, therefore, if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it."[6] This distinction has the countenance of highly respectable authorities.[7] But in the present state of

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[1] Jones on Bailm 43, 44, 45.

[2] Doct. and Stud. Dial. 2, ch. 38; Ante, § 35.

[3] 2 Ld. Raym. 909, 911, 915.

[4] Powell on Contr. 446; Com. Dig. *Condition*, D. 1, L. 12, 13; Co. Litt. 206; 1 Roll. Abridg. *Condition*, G. p. 450, pl. 10; Id. I. p. 451, pl. 1, 2; Williams *v.* Hide, Palmer, R. 548, 550; W. Jones, R. 179; Com. Dig. *Assumpsit*, G.; Bac. Abridg. *Condition*, D. 1, 2; Noy, Max. 35; Harrington *v.* Dennie, 13 Mass. R. 93; Badlam *v.* Tucker, 1 Pick. 284.

[5] 1 Roll. Abridg. *Condition*, G. p. 450, pl. 8, 9, 10; Com. Dig. *Assumpsit*, G.; Baylies *v.* Fettyplace, 7 Mass. R. 325; Phillips *v.* Stevens, 16 Mass. R. 238; 2 Saund. 422, note by Williams (2); 6 T. R. 759.

[6] Paradine *v.* Jane, Aleyn, Rep. 26, 27.

[7] Brecknock and Abergaveny Canal Co. *v.* Pritchard, 6 T. R. 750; Hadley

the law, it does not seem possible to lay down any general rule on the subject, as to what casualties will excuse or not in cases of a special contract.[1]

§ 37. The general rule of the civil law is that stated by Heineccius, that a bailee is never responsible for casualties, unless there has been some unjustifiable delay, or the party has taken upon him the risk of the casualty, or he is at the same time guilty of neglect. *Casus nunquam præstatur, nisi vel in morâ sit debitor, vel casum in se ultro susceperit, vel culpam simul admiserit.*[2] A bailee, therefore, may render himself responsible for casualties, if he chooses to contract against them, even though he be a mere depositary. *Si convenit, ut in deposito et culpa præstetur, rata est conventio; contractus*

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v. Clarke, 8 T. R. 259, 267; Blight *v.* Page, 3 Bos. & Pull. 295, note (a); Atkinson *v.* Ritchie, 10 East, R. 530, 533; Barker *v.* Hodgson, 3 Maule & Selwyn, 267; Sjoerds *v.* Luscombe, 16 East, R. 201; Bullock *v.* Dommit, 6 Term Rep. 650; Digby *v.* Atkinson, 4 Camp. R. 275; Phillips *v.* Stevens, 16 Mass. R. 238; Medeiros *v.* Hill, 8 Bing. R. 231; Abbott on Shipp. Pt. 3, ch. 1, § 14 to 16; Id. ch. 7, § 17, 19; Id. ch. 11, § 3; 2 Story, Eq. Jurisp. § 1303 to 1311; 1 Roll. Abridg. *Condition*, G. pl. 8, l. 20; Id. pl. 9, l. 25; Platt on Covenants, Pt. 6, ch. 2, § 1, p. 582 to 585; Chitty on Contracts, by Perkins, p. 567 to 569, Amer. edit. 1839.

[1] See Post, § 202, 550. A learned friend has submitted the following as the true distinction, which ought to govern in cases of this sort. Where the contract is for a personal service, which none but the promisor can perform, ex. gr., that he will be at a certain place at a certain time, there, inevitable accident will excuse the non-performance, by an inherent condition in the nature of the contract. But, where the thing to be done may be performed by the promisor, or by another person, there, all accidents are at the risk of the promisor, if he makes no exception. It will be found difficult to reconcile this distinction with some of the authorities. See 1 Roll. Abridg. *Condition*, G. pl. 8, 9, 10; Com. Dig. *Condition*, D. 1; Com. Dig. *Action on the Case upon Assumpsit*, G.; Com. Dig. *Covenant*, E. 3; Platt on Covenants, Pt. 6, ch. 2, § 1, p. 582 to 585. Perhaps, if the question was entirely new, the good sense of the doctrine would be, that where the act stipulated to be done by a party becomes impossible to be done by any one, by inevitable accident, or the act of Providence, there the party shall stand excused. But, where the act is stipulated to be done by a party, and he becomes incapable, by death or otherwise, but the act can be done by another person, there, the non-performance shall not be excused.

[2] Heinec. Elem. Jur. Inst. Lib. 2, tit. 14, § 785; 1 Domat, B. 1, tit. 1, § 3, art. 10, and tit. 7, § 3, art. 6; Vinn. ad. Inst. Lib. 3, tit. 15.

enim legem ex conventione accipiunt.[1] But it does not seem precisely laid down, what cases, or rather what special contracts, shall be deemed to include the risk of casualties. The general rule of the civil law would seem to be, that the risk of casualties is never included under the general terms of a contract. But that, however general the undertaking may be, it includes only such risks as might be foreseen, and not those which there could be no room to apprehend. Pothier[2] deduces this doctrine from the civil law; and the Code seems to countenance it; *Quæ fortuitis casibus accidunt, cum prævideri non potuerint* (*in quibus etiam aggressura latronum est*), *nullo bonæ fidei judicio præstantur.*[3] The Code of France adopts into its positive regulations, most, if not all, the rules of the civil law on this subject. It considers the obligation extinguished when the thing, which is the object of the obligation, is extinguished, or has perished without the default of the obligor, or unless he has agreed to be charged with accidents.[4] And the same was the antecedent rule, as we learn from Pothier.[5] Pothier, in another place, says, that, if by his contract the thing is to be at the risk of the hirer during the period of the bailment, by these terms the hirer is responsible for the slightest negligence, but not for losses by casualties, or by the *vis major*.[6]

§ 38. In respect to theft, Sir William Jones has given an opinion, that a loss by private theft is presumptive evidence of ordinary neglect.[7] And he cites with manifest approbation

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[1] Dig. Lib. 16, tit. 3, l. 1, § 6; Dig. Lib. 2, tit. 14, l. 7, § 15; 1 Domat, B. 1, tit. 7, § 3, art. 7; Pothier on Oblig. P. 1, n. 142.

[2] Pothier, Oblig. P. 3, n. 633; Pothier, Traité du Cont. de Louage, n. 5.

[3] Cod. Lib. 4, tit. 24, l. 6; Ante, § 35.

[4] Code Civil, B. 3, tit. 3, § 6, art. 1142, 1302, 1303. — The Civil Code of Louisiana seems to have adopted similar principles. Code Civil of Louisiana (1825), art. 1927, 2216.

[5] Pothier on Oblig. n. 142, 143, 148.

[6] Pothier, Louage, n. 192. — Pothier, in another place, speaks of the word risk, as having several significations, one of which is, that the thing is entirely at the risk or peril (periculum) of the bailee, even against accidents by superior force; and another, when it signifies only that the bailee shall be held liable for any the slightest neglect or fault. Pothier, de Dépôt, n. 32.

[7] Jones on Bailm. 38, 39, 40, 43, 44, 66, 76, 77, 78, 109, 110, and note (q), 119; Ante, 35; Post, § 76, 230.

the commentary of Gothofred on the Pandects, where he says: *Alia est furti ratio; id enim non casui, sed levi culpæ, fermè ascribitur. Adversus latrones parùm prodest custodia; adversus furem prodesse potest, si quis advigilet.*[1] The civil law seems to warrant this distinction.[2] Pothier, too, has adopted it; but he considers the presumption of neglect, in case of theft, to be open to be rebutted by proof of due care.[3]

§ 39. There does not seem to be any such rule adopted into our law, as Sir William Jones supposes. If the theft has been caused by negligence, it is without doubt, that the bailee will be responsible, where the nature of the bailment would make such a degree of negligence a breach of his implied obligation. But, abstractly speaking, there is nothing in the case of theft, from which we have a right to infer, that, because a loss has happened by it, there must have been some neglect.[4] On the contrary, no degree of vigilance will always secure a party from losses by theft. A store may be broken open, however securely locked; a person may be robbed, while riding in a stage-coach, or while asleep; a servant may be faithless, and betray the confidence reposed in him; a person may be seized with a sudden fit, or alienation of mind, and the theft may be committed without any consciousness on his part. In these, and in many other cases, there would not be any presumption of neglect. And the civil law itself supposes, that in such cases the bailee might repel the imputation of negligence.[5] By our law, a bailee is in many cases excusable, when the loss is by theft; but never, when that theft is occasioned by gross negligence. So long ago as the reign of Edward the Third,[6] it was held, that if a person bail his goods to keep, and they are stolen, the bailee is excused. The reasoning of the Court,

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[1] Ante, § 35; Jones on Bailm. 44, n. (o).

[2] Dig. Lib. 17, tit. 2, l. 52, § 3; Wood. Inst. B. 1, ch. 1, p. 107; 1 Domat, P. 1, tit. 4, § 8, art. 3; Just. Inst. Lib. 3, tit. 15, § 2, 3; Jones on Bailm. 44, n. (o); Post, § 334, note.

[3] Pothier, Traité du Prêt à Usage, n. 53.

[4] See Vere *v.* Smith, 1 Vent. 121; s. c. 2 Lev. 3; Jones on Bailm. 98.

[5] Dig. Lib. 13, tit. 6, l. 19, 20, 21; 1 Domat, B. 1, tit. 4, § 8, art. 3; Just. Inst. Lib. 3, tit. 15, § 3.

[6] Year Book, 29, Liber Assisarum, 28.

in Coggs *v.* Bernard,[1] shows, that the Court did not consider theft as *primâ facie* presumptive of negligence. In short, our law considers theft, like any other loss, to depend, for its validity as a defence, upon the particular circumstances of the case, and to be governed by the general nature of the bailment, and the responsibility attached thereto. It raises no presumption either way from the mere fact of theft. It neither imputes the theft to the neglect of the party, nor, on the other hand, exempts him from responsibility, from that fact alone. But, it decides upon all the circumstances of the case, and thence arrives at the conclusion, that there has, or there has not, been a due degree of care used.[2]

§ 39 *a*. In cases of bailment, the question sometimes occurs, how far a second bailee is liable to the original bailor, where the first bailee is a wrongdoer, or where the second bailee claims either by his own tort, or by a defective derivative title under the first bailee. There is no doubt, that in each of these cases the original bailor has a good cause of action, as well against the first bailee, as the second bailee, for each is guilty of a wrong to him.[3] But the form in which the remedy is to be sought has been thought to admit of a distinction. Thus, for example, if the first taker is a trespasser, and the second taker is a trespasser also, an action of trespass, or an action of replevin, or an action of trover, at the election of the owner, will lie against each of them.[4] But, if the first taker only be a wrongdoer, and the second taker comes to the possession of the property by delivery as a purchaser or otherwise, *bonâ fide* and innocently, and without any fault on his own part, it is said that the owner cannot maintain an action of trespass against the second taker; but his appro-

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[1] 2 Ld. Raym. 909. See 1 Vent. 121.

[2] Finucane *v.* Small, 1 Esp. N. P. C. 315; Butt *v.* Great Western Railway Co. 11 C. B. 120, 7 Eng. Law & Eq. R. 448; 2 Kent, Comm. Lect. 40, p. 556, 4th edit.; Fitz. Abridg. *Accompt*, pl. 11; Post, § 76.

[3] See Cummings *v.* Vorce, 3 Hill, R. 282; Barrett *v.* Warren, 3 Hill, R. 348; Acker *v.* Campbell, 23 Wend. R. 372; Cary *v.* Hotailing, 1 Hill, 311; Wilbraham *v.* Snow, 1 Siderf. R. 438.

[4] Ibid.

priate remedy is either an action of trover or of replevin in the detinet.[1]

§ 40. There is another topic, which may properly be considered in this preliminary view of the general doctrine of bailments, inasmuch as it seems applicable to every species of them. An allusion is here intended to the subject of the confusion of property by the bailee, so that the bailor's property cannot be distinguished from his own. Mr. Justice Blackstone has correctly stated the general rule, and truly said, that the English law partly agrees with, and partly differs from, the civil law. "If (says he)[2] the intermixture be by consent, I apprehend, that, in both cases, the proprietors have an interest in common, in proportion to their respective shares.[3] But, if one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or casts gold, in like manner, into another's melting-pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interposed in the mixture, yet allows a satisfaction to the other, for what he has so improvidently lost.[4] But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded, and endeavored to be rendered uncertain, without his consent."[5] But there may be a case of confusion of property, neither by consent, nor by wilfulness; as, where the bailee, by negligence, or unskilfulness, or inadvertence, mixes up his own goods of the same sort with those bailed; and there may also be a confusion arising from mere accident and unavoidable casualty. In the latter case, that of intermixture by accident, the civil law deemed the property to be

[1] Wilson *v.* Barker, 4 Barn. & Adolph. 614; Badkin *v.* Powell, Cowp. R. 428; Comyn, Dig. *Trespass*, D.; Bac. Abridg. *Trespass*, E. 2, citing Bro. Abridg. *Trespass*, pl. 48; Van Brunt *v.* Schenck, 11 Johns. R. 384; McCarty *v.* Vickery, 12 Johns. R. 348; Storm *v.* Livingston, 6 Johns. R. 44; Barrett *v.* Warren, 3 Hill, R. 348. But see the opinion of Mr. Justice Cowen, ibid.

[2] 2 Black. Comm. 405.

[3] Vinn. ad Inst. Lib. 2, tit. 1, p. 169; Just. Inst. Lib. 2, tit. 2, § 27; Ayliffe, Pand. B. 3, tit. 3, p. 291.

[4] Vinn. ad. Inst. Lib. 2, tit. 1, p. 170; Just. Inst. Lib. 2, tit. 1, § 28.

[5] See Hart *v.* Ten Eyck, 2 Johns. Ch. R. 62; 2 Kent, Comm. Lect. 36, p. 364, 365, 4th edit.

held in common, whether the mixture produced a thing of the same sort, or not; as, if the wine of two persons were mixed by accident.[1] The like rule would probably be adopted in our law, under the like circumstances.[2] But in cases of an intermixture by unskilfulness, negligence, or inadvertence, a different rule seems to prevail in our law. In cases of this nature, the principle seems to be, that, if a man, having undertaken to keep the property of another distinct from his own, mixes it with the latter, the whole must, both at law and in equity, be taken to be the property of the bailor, until the bailee puts the subject-matter under such circumstances, that it may be distinguished as satisfactorily, as it might have been before that unauthorized mixture on his part. This rule has been laid down by Lord Eldon,[3] and by the Court of Exchequer.[4] In the case before Lord Eldon, he said: "What are the cases, in the old law, of a mixture of corn and flour? If one mixes his corn or flour with that of another, and they were of equal value, the latter must have the given quantity. But, if articles of different value are mixed, producing an aggregate of both, and, through the fault of the person mixing them, the other party cannot tell what was the original value of his property, he must have the whole." Mr. Chancellor Kent has acted upon a similar principle, holding, that, if a person, having charge of the property of another, so confounds it with his own, that it cannot be distinguished, he must bear all the inconveniences of the confusion. If he cannot distinguish and separate his own, he shall lose it.[5] The conclusion to be drawn from these decisions, and other authorities,[6] seems to be, that, in cases of negligent and inadvertent mixtures (perhaps even of wilful mixtures), if the goods can be easily distinguished and separated, then no change of property takes place, and each party may lay claim to his own.

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[1] Vinn. ad Inst. Lib. 2, tit. 2, § 28.

[2] Dane's Abridg. ch. 76, art. 5, § 19.

[3] Lupton *v.* White, 15 Ves. 432, 436, 439.

[4] Panton *v.* Panton, cited 15 Ves. 440.

[5] Hart *v.* Ten Eyck, 2 Johns. Ch. R. 62.

[6] See Bond *v.* Ward, 7 Mass. R. 123; Dane's Abr. ch. 76, art. 3, § 15.

If the goods are of the same nature and value, although not capable of an actual separation by identifying each particular; yet, if a division can be made of equal value (as in the case of a mixture of corn, or coffee, or tea, or wine of the same kind and quality), there each may claim his aliquot part. But, if the mixture is undistinguishable, and a new ingredient is formed, not capable of a just appreciation and division, according to the original rights of each, there the party who occasions the wrongful mixture must bear the whole loss.[1]

CHAPTER II.

ON DEPOSITS.

§ 41. A DEPOSIT is usually defined to be a naked bailment of goods, to be kept for the bailor without reward, and to be returned, when he shall require it.[2] Perhaps a more correct definition would be, that it is a bailment of goods to be kept by the bailee without reward, and delivered according to the object or purpose of the original trust; for, in some cases, the deposit may be for the benefit of a third person, and to be delivered to him when demanded, and not to be returned to the bailor. The definition of the Roman law, as we shall presently see, is singularly brief, and pregnant in meaning.

§ 42. Pothier defines it to be a contract, by which one of the contracting parties gives a thing to another to keep, who is to do so gratuitously, and obliges himself to return it, when he

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[1] See Ayliffe, Pand. B. 3, tit. 3, p. 291, 292; Erskine, Inst. B. 2, tit. 1, § 17; 1 Story on Eq. Jurisp. § 623; Story on Agency, § 193; 2 Story on Eq. Jurisp. § 1282, 1283.

[2] Jones on Bailm. 36, 117; 1 Bell, Comm. § 199, 4th edit.; 1 Bell, Comm. p. 257, 5th edit. See also, 1 Dane's Abr. ch. 17, art. 1, § 3; 1 Stair, Inst. B. 1, tit. 13, § 1; Ersk. Inst. B. 3, tit. 1, § 26; 2 Kent, Comm. Lect. 40, p. 560, 4th edit.; 1 Domat, B. 1, tit. 7, § 3.

shall be requested.[1] In the Spanish Partidas, it is thus defined: "When one man gives any thing to another, in whom he has confidence, to keep it for him."[2]

§ 43. The word is derived from the Latin, *Depositum*, which, Ulpian informs us, is compounded of *de* and *positum*. *Depositum est, quod custodiendum alicui datum est. Dictum ex eo quod ponitur; prepositio enim, de, auget depositum; ut ostendat, totum fidei ejus commissum, quod ad custodiam rei pertinet.*[3] It is also sometimes called *Commendatum*, for *Commendare nihil aliud est, quam deponere.*[4]

§ 44. Deposits, in the civil law, are divisible into two kinds; necessary and voluntary. A necessary deposit is such as is made by the party upon some sudden emergency, and from some pressing necessity, as, for instance, in case of a fire, a shipwreck, or other overwhelming calamity; and it is, therefore, confided to any person, with whom the depositor meets, without any proper opportunity for reflection or choice;[5] and thence it is called *Miserabile depositum.*[6] A voluntary deposit is such as arises without any such calamity, from the mere consent and agreement of the parties.[7] This distinction was material in the civil law in respect to the remedy; for, in voluntary deposits, the action was only *in simplum*, in the other, it is *in duplum*, or twofold, whenever the depositary was guilty of any default.[8] The common law has made no such distinction; and, therefore, in a necessary deposit, the remedy is limited to damages coextensive with the wrong.[9]

§ 44 *a*. There is another class of deposits, which may properly be called involuntary, as contradistinguished from necessary and voluntary, inasmuch as each of the latter presupposes

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[1] Pothier, Traité de Dépôt, n. 1. See Code Civil of France, art. 1915.

[2] Moreau and Carlton's Partidas, 5th, tit. 3, b. 1.

[3] Dig. Lib. 16, tit. 3, b. 1; Heinec. Pand. Lib. 16, § 217.

[4] Dig. Lib. 50, tit. 16, § 186.

[5] Pothier, Traité de Dépôt, n. 75; 1 Domat, B. 1, tit. 7, § 5, art. 1, 2.

[6] Pothier, Traité de Dépôt, n. 75.

[7] Dig. Lib. 16, tit. 3, § 2; 1 Pothier, Pand. Lib. 16, tit. 3, n. 1; Heinec. Elem. Pand. Lib. 16, tit. 3, § 219.

[8] Dig. Lib. 16, tit. 3, § 2, 3, 4; Pothier, Pand. Lib. 16, tit. 3, n. 16, 44, 51.

[9] Jones on Bailm. 48.

some act of the depositor, whereas involuntary deposits may be without the assent, or even knowledge, of the depositor. Thus, for example, where lumber, floating in a river, is by a great flood or freshet thrown upon the land of another person, and is there left by the subsidence of the stream, it may properly be called an involuntary deposit.

§ 45. Deposits are again divided, in the civil law, into simple deposits and sequestrations; the former is, when a deposit is made by one or more persons, having a common interest;[1] the latter is, when the deposit is made by one or more persons, each of whom has a different and adverse interest in controversy touching it; *Proprie autem in sequestre est depositum, quod a pluribus in solidum certâ conditione custodiendum reddendumque traditur.*[2] *Sequester dicitur, apud quem plures eandem rem, de quâ controversia est, deposuerunt.*[3] Deposits by sequestrations are of two sorts; first, conventional, or such as are made by the mere agreement of the parties without any judicial act; secondly, judicial, or such as are made by order of a Court in the course of some judicial proceeding.[4] In all these cases of sequestrations, the depositary is a mere stakeholder, and the deposit is to be delivered to him who is adjudged ultimately to have the right.[5]

§ 46. These distinctions are also found in the French law;[6] and they give rise to different considerations in point of responsibility and rights.[7] Hitherto they do not seem to have been

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[1] Pothier, Traité de Dépôt, 1.

[2] Dig. Lib. 16, tit. 3, l. 6; Pothier, Pand. Lib. 16, tit. 3, n. 58; 1 Domat, B. 1, tit. 7, Prelim. Obs.; Pothier, Traité de Dépôt, n. 1, 84.

[3] Dig. Lib. 50, tit. 16, l. 110; Pothier, Pand. Lib. 16, tit. 3, n. 58; Pothier, Traité de Dépôt, n. 1, 84.

[4] Pothier, Traité de Dépôt, n. 84, 85, 90 to 100; Code of Louisiana, of 1825, art. 2941, 2948; 1 Domat, B. 1, tit. 7, § 4, art. 1.

[5] Dig. Lib. 16, tit. 3, l. 5, § 1, 2; Id. l. 7; Ayliffe, Pand. B. 4, tit. 17, p. 519, 520; Pothier, Traité de Dépôt, n. 1; 1 Domat, B. 1, tit. 7, Prelim. Obs.; Id. tit. 7, § 4, art 5; Lafarge *v.* Morgan, 11 Martin, R. 462, 522; Code of Louisiana (1825), art. 2946.

[6] Pothier, Traité de Dépôt, Art. Prelim. n. 84; Code de France, B. 3, tit. 11, art. 1920, 1921, 1949; Moreau and Carlton, Partidas 5, tit. 3, l. 1.

[7] Pothier, Traité de Dépôt, n. 85 to 88.

incorporated into our law; although, if cases should arise, the principles applicable to them could scarcely fail of receiving general approbation, at least so far as they affect the rights and the responsibilities of the parties. Cases of judicial sequestrations and deposits, especially in courts of equity and courts of admiralty, may hereafter require the subject to be fully investigated. At present, fortunately, there have been few cases, in which it has been necessary to consider upon whom the loss should fall, when the property has perished in the custody of the law.[1] The general rule seems to be, that, in cases of conventional sequestrations, the depositary contracts the same obligations, as to diligence and care of the deposit, and the restitution of it, as he incurs in an ordinary deposit; and the depositor contracts the like reciprocal obligations to the depositary.[2] In cases of judicial sequestrations, when the depositary receives a compensation, he will be liable, like other persons for hire, for ordinary diligence.[3] A receiver of money will sometimes be liable for extraordinary diligence, and bound by slight neglect.[4]

§ 47. A deposit differs from what is called in the civil law a *mutuum*, for in the latter case the identical thing lent is not to be returned, but another thing of the same kind, quality, nature, or value.[5] Thus, for example, where the loan is of money, wine, or other things, that may be valued by number, weight, or measure, and are to be restored only in equal value or quantity, it is a *mutuum*.[6] In a *mutuum* the property

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[1] See Burke *v.* Trevitt, 1 Mason, R. 96, 101; Post, § 125 to 132, 620.

[2] Pothier, Traité de Dépôt, n. 88, 98; Lafarge *v.* Morgan, 11 Martin, R. 462, 522; Code of Louisiana (1825), art. 2944.

[3] Pothier, Traité de Dépôt, n. 96; Code of Louisiana (1825), art. 2943, 2949, 2950.

[4] Pothier, Traité de Dépôt, n. 109, 110, 111.

[5] Just. Inst. Lib. 3, tit. 15; Dig. Lib. 44, tit. 9, l. 1, § 2; Dig. Lib. 12, tit. 1, l. 2, § 2; Pothier, Pand. Lib. 12, tit. 1, n. 9, 10; Pothier, Prêt à Usage, n. 10, 17; Pothier, Prêt de Consumption, n. 1, 4; Ayliffe, Pandect, B. 4, tit. 17; 1 Bell, Comm. § 197, 4th edit.; 1 Bell, Comm. p. 257, 258, 5th edit.; 1 Stair, Inst. B. 1, tit. 11, § 1; Ersk. Inst. B. 3, tit. 1, § 18.

[6] Jones on Bailm. 64; Pothier, Traité du Prêt à Usage, n. 10; 1 Stair, Inst. B. 1, tit. 11, § 1.

passes immediately from the *mutuant*, or lender, to the *mutuary*, or borrower, and the identical thing lent cannot be recovered or redemanded.[1] *Mutuum damus recepturi non eandem speciem quam dedimus, alioquin commodatum erit aut depositum, sed idem genus.*[2] Indeed, it is said in the civil law to derive its name from this very circumstance. *Appellata est autem mutui datio ab eo, quod de meo tuum fit; et ideo si non fiat tuum, non nascitur obligatio.*[3] But, in the case of a mere deposit, the property is not, as we shall hereafter see,[4] transferred or alienated; but it remains in the depositor; and the depositary has the mere possession or custody of the thing.[5]

§ 48. In the civil and French law, as in our law, the principles which regulate the contract of deposit are deductions from natural law, and do not depend upon any positive regulations. Pothier boasts, that such is the foundation of the whole system: *Il n'est assujetti* (says he) *par le droit civil à aucune règle, ni à aucune forme.*[6] He classes it, in his formal divisions, as contract of natural law (*droit naturel*); as a contract of beneficence; as a real contract in the sense of the civil law, by which is meant such a contract as takes effect by the delivery of the thing itself; and as a synallagmatical or bilateral contract, embracing reciprocal obligations; although it is imperfectly so, as the obligation of the depositary is the principal, and that of the depositor is a mere incident.[7] These divisions

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[1] Ayliffe, Pand. B. 4, tit. 17, p. 519; Just. Inst. Lib. 3, tit. 15, Proem.; 1 Stair, Inst. B. 1, tit. 11, § 2; Ersk. Inst. B. 3, tit. 1, § 17, 18; Code of Louisiana (1825), art. 5912; Jones on Bailm. 64; Pothier, Traité du Prêt à Usage, n. 10; 1 Bell, Comm. § 197, 4th edit. Ayliffe uses the words *mutuant* and *mutuary*. Ayliffe, Pand. B. 4, tit. 11, p. 481.

[2] Pothier, Prêt de Consumption, n. 13; Dig. Lib. 12, tit. 1, l. 2.

[3] Dig. Lib. 12, tit. 1, l. 2, § 2; Pothier, Pand. Lib. 12, tit. 1, n. 9, 10; 1 Stair, Inst. B. 1, tit. 11, § 2; Pothier, Prêt de Consumption, n. 25; Post, § 284.

[4] Post, § 93, 94, 95, 150, 279, 283; St. German's Doctor and Student, ch. 38; 1 Stair, Inst. B. 1, tit. 11, § 2; Hurd *v.* West, 7 Cowen, R. 752, 756.

[5] Pothier, Traité de Dépôt, n. 11, 12; Pothier, Traité du Prêt à Usage, n. 10; Dig. Lib. 16, tit. 3, l. 17; Ayliffe, Pand. B. 4, tit. 17; Hartop *v.* Hoare, 3 Atk. 44; s. c. 2 Str. 1187; 1 Wils. R. 8; 1 Bell, Comm. § 199, 4th edit.; 1 Bell, Comm. p. 257, 258, 5th edit.; 2 Kent, Comm. Lect. 40, p. 568, 573, 585, 4th edit.

[6] Pothier, Traité de Dépôt, n. 18 to 21; Pothier on Oblig. n. 9.

[7] Pothier, Traité de Dépôt, n. 18 to 21.

are not usually found in the treatises of the common law, although they have a just foundation in every system, aiming at entire accuracy.

§ 49. In considering the definition of a deposit, we are naturally led to the consideration of the persons by and between whom it may be made; the subject-matter of it; what is of its essence; when it is perfected; and lastly, the obligations which arise from it.

§ 50. In respect to the persons by and between whom it may be made, it is only necessary to state, that it is not distinguishable from other contracts in this respect.[1] It may be made by and between any persons who are capable of making a valid contract; but not by and between those who are incapable. Infants, married women, and other persons laboring under personal disability, cannot bind themselves, either as depositors, or as depositaries, although other persons may be bound to them. If an infant receives a deposit, he is, by the general principles of law, bound to restore it, if it is in his possession, or under his control; but he is not responsible if he loses it.[2] He may become responsible for any wilful wrong he does to it; but he is not responsible upon the contract, unless it be a necessary contract, and manifestly for his benefit.[3] On the other hand, an infant may make a deposit; and in such a case, all the obligations of a depositary are binding upon the other party, until the infant repudiates the contract, or recalls the thing deposited.[4] In the case of a married woman, if she makes a deposit without the consent of her husband, it is a mere void act, and no contract of deposit arises; but the depositary will be bound to restore it to the husband.[5] If, on the other hand, a married woman becomes a depositary without the consent of her husband, the act is a mere nullity, and no con-

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[1] Post, § 162, 229.

[2] Mills *v.* Graham, 4 Bos. & Pull. 140, 144; Code of Louisiana (1825), art. 2906, 2907.

[3] See 1 Story on Eq. Jurisp. § 240, 241, 242; Pothier, Traité de Dépôt, n. 5; Mills *v.* Graham, 4 Bos. & Pull. 140, 144.

[4] Code of Louisiana (1825), art. 2906.

[5] Pothier, Traité de Dépôt, n. 6; 1 Story on Eq. Jurisp. § 243; Bac. Abridg. *Bailment.*

tract of deposit arises. Yet the husband will, in such a case, be bound to restore the thing to the depositor, if it is in his possession.[1] Such also is the doctrine of the French law.[2] The rule of the civil law is laid down somewhat differently; for it is there said, that a slave or an unemancipated child may make a deposit, and be held liable upon a deposit; yet, perhaps, it may be only where the act is done with the assent of the owner or father.[3]

§ 51. In respect to the subject-matter, it is in our law limited to personal or movable property, and is inapplicable to real or immovable property. The civil law, and the French law (which follows it), confine the bailment to corporeal property; and do not admit its application to incorporeal property, such as choses in action and debts. But the title deeds, or evidences of such debts and credits, *ipsa instrumentorum corpora*, may become the subject of a bailment.[4] The distinction is nice; but as the loss of the instrument will entitle the party to a recompense, adequate to the injury done him, it is unimportant in practice.[5] In the common law, and in the Scotch law, debts, choses in action, and other instruments and evidences of debts, may become the subject of a deposit, properly so called.[6]

§ 52. It is not essential that the depositor should have an absolute title in the thing, in order to make it a valid deposit. It is sufficient, that he has a special property in it, or a lawful possession of it.[7] Nay, even a person who holds

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[1] Pothier, Traité de Dépôt, n. 6; 1 Story on Eq. Jurisp. § 243; 2 Saunders, R. 47, b., Patterson & Williams's note (f); Smith *v.* Plomer, cited there, and in Peake on Evid. p. 342, 4th edit.

[2] See Pothier, Traité de Dépôt, n. 5, 6; Pothier on Oblig. § 49; Code of Louisiana (1825), art. 2907.

[3] See Ayliffe, Pand. B. 4, tit. 17, p. 522; Dig. Lib. 16, tit. 3, l. 11, 19; Pothier, Pand. Lib. 16, tit. 3, n. 41.

[4] Pothier, Traité de Dépôt, n. 2; Pothier, Pand. Lib. 16, tit. 1, n. 2, 3, 4.

[5] Com. Dig. *Trover*, C.; Arnold *v.* Jefferson, 1 Ld. Raym. 275; 1 Roll. Abridg. 5, K. 3.

[6] 1 Bell, Comm. § 199, 4th edit.; 1 Bell. Comm. p. 258, 5th edit.

[7] Armory *v.* Delamirie, 1 Str. 505; Rooth *v.* Wilson, 1 Barn. & Ald. 59; Com. Dig. *Action on the Case*, *Trover*, B. D.; 2 Saund. 47, and note by Williams; 2 Kent, Comm. Lect. 40, p. 566, 567, 4th edit.; 1 Stair, Inst. B. 1, tit. 11, § 8.

property by wrong, and without title, may lawfully deposit the same; and he will be entitled to recover back the same against every one but the rightful owner.[1] This is strongly put in the civil law, even in the case of a robbery or theft. *Si prædo, vel fur deposuerint, et hos Marcellus putat recte depositi acturos.*[2] But in such a case, if the bailee ascertains who the rightful owner is, and that the goods have been stolen, the same law declares him at liberty, if it is not his absolute duty, to restore the goods to such owner.[3] And so is the French law.[4] By the civil law, the owner was entitled to recover his property, tortiously taken, from any one into whose hands he could trace it. If there had been a second bailment, he might, at his election, proceed directly against the second bailee; and if he recovered it against the latter, the right of the first bailee was extinguished.[5] In the common law, also, where there has been a tortious conversion or possession, the owner may follow his property, wherever he can find it.[6] Where there has been an original bailment by the owner, and a subsequent bailment by his bailee, if an action of *detinue* be brought by the owner against the last bailee, the latter may, in some cases, compel the owner and the first bailee to interplead, and thus escape the dangers of a double recovery.[7] This remedy was given in the old common law; and it has been materially enlarged by the beneficent operation of the jurisdiction of

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[1] Ayliffe, Pand. B. 4, tit. 17, p. 522; Dig. Lib. 16, tit. 3, l. 31, § 1. See Learned *v.* Bryant, 13 Mass. R. 224; Post, § 132; Pothier, Traité de Dépôt, n. 51.

[2] Dig. Lib. 16, tit. 3, l. 1, § 39; Post, § 108.

[3] Dig. Lib. 16, tit. 3, l. 31, § 1; Post, § 108.

[4] Pothier, Traité de Dépôt, n. 51.

[5] Ayliffe, Pand. B. 4, tit. 17, p. 522; Dig. Lib. 16, tit. 3, l. 1, § 30; Id. l. 31, § 1. See also, 1 Roll. Abridg. *Detinue*, C. 4.

[6] Hartop *v.* Hoare, 3 Atk. 44; Taylor *v.* Plumer, 3 M. & Selw. 562; 2 Story, Eq. Jurisp. § 1257 to 1260; 2 Kent, Comm. Lect. 40, p. 566, 567, 4th edit.; Mills *v.* Graham, 4 Bos. & Pull. 140, 147, per Chambre, J.; Post, § 102, 103, 105, 106.

[7] Rich *v.* Aldred, 6 Mod. R. 216; 1 Roll. Abridg. *Interpleader;* 2 Viner, Abridg. *Bailment*, E. § 32; Id. *Interpleader;* 2 Story on Eq. Jurisp. § 801 to 804; Post, § 111, 112, 281, 282; 2 Kent, Comm. Lect. 40, p. 567, 568, 4th edit.

courts of equity.[1] But this subject will more properly find a place in a subsequent discussion.[2]

§ 53. If by mistake, or otherwise, the real owner receives his own property on deposit, his obligation to return it is extinguished, unless another person has acquired, as against him, some right, interest, or lien, which he is bound to respect. *Qui rem suam deponi apud se patitur, vel utendam rogat, nec depositi nec commodati actione tenetur.*[3] And the same principle will apply where he has subsequently become entitled as owner.[4]

§ 54. It is said in the civil law, that, by a delivery of the principal thing, that which is accessorial does not pass; as, if a slave with his clothing on is deposited, or a horse with his halter, neither the clothes nor the halter are deposited.[5] But this doctrine, if true at all in our law, must be received with many qualifications. It must always depend upon the intent of the parties. And even in the civil law, Pothier seems to consider the text as including no more than the proposition, that the clothing and the halter cannot be demanded in a separate action of deposit, but only as an accessory in the principal action for the slave or the horse; at least, unless the slave or the horse have perished.[6]

§ 55. As to what is of the essence of the contract of deposit. The civil law has expounded this with minute accuracy. In the first place, the thing must be actually delivered to the bailee, if he has it not already in his possession. In this sense, a deposit is a real contract in the sense of the civil law.[7] A mere contract, where the thing has never really or constructively been delivered, does not amount to a deposit.[8] But the

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[1] Bac. Abridg. *Bailment*, D.; Com. Dig. *Chancery, Interpleader;* 2 Bulstrode, R. 313; 2 Story on Eq. Jurisp. § 805 to 807, 814 to 820; 2 Kent, Comm. Lect. 40, p. 567, 568, 4th edit.

[2] Post, § 111, 112.

[3] Dig. Lib. 16, tit. 3, l. 15; Pothier, Traité de Dépôt, n. 4; Post, § 110.

[4] Ibid.

[5] Dig. Lib. 16, tit. 3, l. 1, § 5.

[6] 1 Pothier, Pand. Lib. 16, tit. 3, n. 46. See also, Pothier, Traité de Dépôt, n. 44.

[7] Ante, § 48; Code of Louisiana (1825), art. 2901.

[8] Dig. Lib. 16, tit. 3, l. 26, § 2.

delivery, both by our law and the civil law, is complete, whether given personally by the bailor, or by his order or approbation, when and as soon as the thing is received by the bailee, or by another for him, with his privity and approbation. When it is received by another person, it must clearly appear that the delivery is not on his own account, but is on account of the party who is charged as bailee. A delivery to a servant, acting in the business of his master, is a delivery to the master, and binds the latter. Therefore, the delivery of a special deposit to the cashier of a bank, who is usually intrusted with that duty, is a delivery to the bank itself. But it would be otherwise, if the receipt were by a servant not intrusted with that duty, or if the receipt were clandestine, and in fraud of the master, and without his privity or consent.[1] In respect to an implied or constructive delivery, any circumstances, which establish that the bailee assents to hold the property for another, although the same may not be in his actual possession, will be sufficient for this purpose. As, if a creditor, holding a pledge, assent, after payment of the debt, to hold it for the benefit of his debtor, it becomes a deposit. So, if a thing is hired, and the purpose of the hiring has been executed, and the property still remains with the hirer, with the assent of the lender, it becomes a virtual deposit with the hirer.[2]

§ 56. In the next place, it is said that the principal end of the delivery must be merely to keep the thing for the owner; if it be not, then it becomes a different species of contract.[3] Thus, if the delivery is made in order to transfer the property in the thing to the party, as, for example, if the delivery is upon a donation, or a sale, or an exchange, or any other like valuable contract, it cannot technically be called a deposit.[4] Another example put is, where title deeds are delivered to an attorney or solicitor, to enable him to defend my cause; there it is said, not to be a case of deposit, but of mandate.[5] So, if

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[1] Foster *v.* Essex Bank, 17 Mass. R. 479, 498; Post, § 60.

[2] Dig. Lib. 16, tit. 3, § 14; Pothier, Traité de Dépôt, n. 8.

[3] Thibaud *v.* Thibaud's Heirs, 1 Martin, R. 493.

[4] Pothier, Traité de Dépôt, n. 9; 1 Domat, B. 1, tit. 7, § 3, art. 1.

[5] Pothier, Traité de Dépôt, n. 9; Pothier, Pand. Lib. 16, tit. 1, n. 4.

A delivers a thing to B, that, if Titius will not receive it, B shall keep it for A; or if A directs B to get a thing, which is in the custody of another, and to keep it for A; both of these are deemed cases of mandates, and not of deposits; for the maxim is, *Uniuscujusque contractûs initium spectandum et causam.*[1] These distinctions seem unimportant in our law, however important they may be (as they are said to be) in the civil law.

§ 57. In the next place, the custody must be gratuitous; which results, indeed, from the very definition already given.[2] And care should be taken not to confound cases, where a compensation is allowed, with cases of pure deposit. Sometimes a compensation may be given to the party *diverso intuitu*, and yet the contract may be a pure deposit; and sometimes the case may be of a mixed nature. As, if A desires to hire the use of my barn, in common with me, for his chaise, for a specific price, to which I agree; and I keep my own carriage in the same barn; and afterwards he desires me to take care of his chaise, when in the barn, to which I assent; there I am a mere depositary of the chaise. But if the original contract were, that for the hire of the barn I should take care of the chaise, there it would be the case of a lucrative contract, and not a mere deposit. The same rule would apply to a case where a trunk of the bailor should be delivered to the bailee for safe custody, and the bailor should at the same time agree to pay a certain sum per week for room-rent for the trunk, but nothing was to be paid on account of the care and custody thereof, the trunk would be a mere deposit.[3]

§ 58. In the next place, the deposit must ordinarily be made with some other person than the owner; for, if he receives his own property, as we have already seen, he generally receives it

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[1] Dig. Lib. 17, tit. 1, l. 8; Dig. Lib. 16, tit. 3, l. 1, § 11, 12, 13, 30; Pothier, Pand. Lib. 16, tit. 3, n. 4; Pothier, Traité de Dépôt, n. 9.

[2] Dig. Lib. 16, tit. 3, l. 1, § 8, 9; Pothier, Traité de Dépôt, n. 9; Durnford *v.* Sedler's Syndics, 11 Martin, R. 484; Code of Louisiana (1825), art. 2900.

[3] See Finucane *v.* Small, 1 Esp. R. 315; 2 Kent, Comm. Lect. 40, p. 565, 4th edit.; Pothier, Traité de Dépôt, n. 13, 31.

discharged of the bailment.[1] There may, however, arise cases of deposit, where a bailee of the owner having an interest in the property, delivers the same to the owner, for a limited time, to be redelivered to the bailee on request, or at the end of the term. Thus, for example, if a box of jewels should be pledged by its owner for a debt, and the pledgee, being about to go a journey, should deliver it to the pledgor, to be kept as a deposit until his return, it would be a good deposit.[2]

§ 59. And, in the last place, there must be a voluntary consent of the parties in entering into the contract.[3] If, on either side, there is a real mistake as to the contract and its purport, it is obligatory on neither as a deposit; although, when an actual delivery of the thing has taken place, other obligations, founded upon conscience and right, may be substituted by law between the parties.[4] But a mere mistake of the quantity or the quality of the thing, or of the person of the bailor or the bailee, will not render it less obligatory upon the bailee as a deposit, unless a fraud or intentional imposition has intervened.[5]

§ 60. In every case, however, there must be a voluntary undertaking; for it is not in the power of a bailor to force upon another person any custody of his goods; but it must be voluntarily assumed. Therefore, a person to whom a valuable picture is sent as a depositary, will not be answerable, if he has no knowledge of the fact, and has not assented to receive it.[6] Direct proof, indeed, is not indispensable; for consent may be inferred from circumstances.[7] Where servants and clerks are allowed to receive deposits, and especially if the practice is general and unlimited, their acts will bind their principals as depositaries. But it will be otherwise, if the

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[1] Dig. Lib. 16, tit. 3, l. 31, § 1; Pothier, Traité de Dépôt, n. 4; Ante, § 53; Civil Code of France, art. 1946; Code of Louisiana (1825), art. 2930.

[2] Pothier, Traité de Dépôt, n. 4. See also, Roberts *v.* Wyatt, 2 Taunt. R. 268; Post, § 299.

[3] Code of Louisiana (1825), art. 2903, 2904.

[4] Pothier, Traité de Dépôt, n. 16.

[5] Pothier, Traité de Dépôt, n. 16, 17.

[6] Lethbridge *v.* Phillips, 2 Stark. R. 544.

[7] Code of Louisiana (1825), art. 2904.

deposit is received by servants or clerks clandestinely, and without any consent, express or implied, on the part of their principals.[1]

§ 61. Let us now pass to the consideration of the obligation arising on the part of the depositary from the fact of the deposit. It consists of two things; first, that he shall keep it with reasonable care; secondly, that he shall, upon request, restore it to the depositor, or otherwise deliver it according to the original trust.[2] [And if the bailor were not the true owner, and the depositary deliver the property to the rightful owner, this is a good defence to an action by the bailor.[3]]

§ 62. As to the first, the natural inquiry is, What is to be deemed reasonable care? Being a bailee without reward, the depositary is bound, of course, upon the principles already stated in the introductory chapter, to slight diligence only; and he is not, therefore, answerable, except for gross neglect.[4] But in every case, good faith requires that he should take reasonable care of the deposit; and what is reasonable care must materially depend upon the nature, value, and quality of the thing, the circumstances under which it is deposited, and sometimes upon the character and confidence, and particular dealings of the parties.[5] The degree of care and diligence is not altered by the fact, that the depositary is a joint owner of the goods with the depositor; for in such a case, if the possessor is guilty of gross negligence, he will still be responsible, in the same manner as a common depositary, who has no interest in the thing.[6]

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[1] Foster *v.* Essex Bank, 17 Mass. R. 479, 498; Ante, § 55.

[2] 1 Dane, Abridg. ch. 17, art. 1, 2; 2 Black. Comm. 452; Pothier, Traité de Dépôt, n. 22.

[3] King *v.* Richards, 6 Wharton, 418.

[4] 1 Dane, Abridg. ch. 17, art. 2; Ante, § 23; 2 Kent, Comm. Lect. 40, p. 560, 4th edit.; Doorman *v.* Jenkins, 2 Adolph. & Ellis, R. 256; Pothier, Traité de Dépôt, n. 23, 26, 28, 29; Lafarge *v.* Morgan, 11 Martin, 462; Foster *v.* Essex Bank, 17 Mass. R. 500; Edson *v.* Weston, 7 Cowen, R. 278; Smith *v.* The Nashua & Lowell Railroad, 7 Foster, 86.

[5] See Tompkins *v.* Saltmarsh, 14 Serg. & R. 275; 2 Kent, Comm. Lect. 40, p. 561, 4th edit. The question, what is gross negligence or not, is ordinarily a matter of fact for the jury to decide, and not of law for the court. Doorman *v.* Jenkins, 2 Adolph. & Ellis, R. 256; Ante, § 11.

[6] Jones on Bailm. 82, 83; Ante, § 15.

§ 63. It is often laid down in our books, that the depositary is bound to take the same care of the deposited goods as he takes of his own; and it is thence deduced as a corollary, that, if he commits a gross neglect in regard to his own goods, as well as in regard to those bailed, by which both are lost, he is not liable, and the depositor must impute it to his own folly to have trusted so improvident a person. Sir William Jones seems, in some places, so to understand the doctrine.[1] Thus, in his commentary on the case of Mytton *v.* Cook,[2] where a painted cartoon, pasted on canvas, had been deposited, and the bailee kept it so near a damp wall, that it peeled, and was much injured, and the verdict was for the plaintiff, he says: "If it had been proved, that the bailee had kept his own pictures of the same sort in the same place and manner, and they too had been spoiled, a new trial would, I conceive, have been granted."[3] And Bracton[4] lays down the same rule: *Is, apud quem res deponitur, re obligatur, et de eâ re, quam accepit, restituendâ tenetur; et etiam ad id, si quid in re depositâ dolo commiserit. Culpæ autem nomine non tenetur, scilicet, desidiæ vel negligentiæ, quia qui negligenti amico rem custodiendam tradit, sibi ipsi et propriæ fatuitati hoc debet imputare.* In this he does no more than copy the language of the Institutes;[5] and he is supported by the clear result of the Pandects.[6] Lord Holt, too, has given the doctrine the authority of his own great name.[7] Pothier inplicitly adopts it,[8] and he is followed by Mr. Chancellor Kent,[9] and other learned judges.[10]

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[1] Jones on Bailm. 31, 32, 46, 47. But see Id. 82, 83, 122, 123; 1 Dane, Abridg. ch. 17, art. 1, § 3; Post, § 337.

[2] 2 Str. R. 1099.

[3] Jones on Bailm. 122, 123.

[4] Bracton, Lib. 3, cap. 2, § 1, p. 99, b.

[5] Just. Inst. Lib. 3, tit. 15, § 3.

[6] Dig. Lib. 16, tit. 3, l. 20, 32; Pothier, Pand. Lib. 16, tit. 1, n. 25, 28, 29; Domat, Lib. 1, tit. 7, § 3, n. 2.

[7] Coggs *v.* Bernard, 2 Ld. Raym. 909, 914; S. P. 1 Ld. Raym. 655.

[8] Pothier, Traité de Dépôt, n. 23, 27.

[9] 2 Kent, Comm. Lect. 40, p. 562, 563, 4th edit. and note (a).

[10] Foster *v.* Essex Bank, 17 Mass. R. 579, 499; Gibbon *v.* Paynton, 4 Burr. 2298. The modern Civil Code of France (art. 1927) adopts the same rule.

§ 64. Notwithstanding the weight of these authorities, they do not seem to me to express the general rule in its true meaning. The depositary is, as has been seen, bound to slight diligence only; and the measure of that diligence is that degree of diligence which persons of less than common prudence, or indeed of any prudence at all, take of their own concerns.[1] The measure, abstractly considered, has no reference to the particular character of an individual; but it looks to the general conduct and character of a whole class of persons;[2] and so Sir William Jones has intimated on some occasions.[3]

§ 64 *a*. There is a very recent case, which seems to me fully to recognize the doctrine for which I contend, that it will not exempt the depositary from liability for gross negligence, that he has kept the deposit in the same place, or with the same care, that he has kept his own property. In that case, a coffee-house keeper received a deposit of money, and placed it in his cash-box in his tap-room, in which he kept his own cash; and both were stolen together. Lord Chief Justice Denman told the jury, that it did not follow from the defendant's having lost his own money at the same time as the plaintiff's, that he had taken such care as a reasonable man would ordinarily take of his own; and that the fact relied on was no answer to the action, if the jury believed that the loss had occurred from gross negligence. And this direction was held right by the whole Court, and the verdict found for the plaintiff was confirmed.[4]

The depositary must bestow (says the Code), in the keep of the thing deposited, the same care that he bestows in the keep of things belonging to himself. The Code of Louisiana (art. 2908, edit. 1825) is to the same effect.

[1] Tompkins *v.* Saltmarsh, 14 Serg. & Rawle, 275; Jones on Bailm. 8, 118, 119; Ante, § 16; 1 Stair, Inst. B. 1, tit. 13, § 2.

[2] See Jones on Bailm. 82, 83; Tompkins *v.* Saltmarsh, 14 Serg. & Rawle, 275. See also, Foster *v.* Essex Bank, 17 Mass. R. 479.

[3] Jones on Bailm. 82, 83, 88; Post, § 66, 337.

[4] Doorman *v.* Jenkins, 2 Adolph. & Ellis, 256; s. c. 4 Nev. & Mann. 170. See also, Tracey *v.* Wood, 3 Mason, R. 132; Post, § 67. Mr. Justice Taunton, in Doorman *v.* Jenkins, 2 Adolph. & Ellis, 256, in delivering his opinion, said: "What care does he (the defendant) exercise? He puts it (the money), together with money of his own, which I think perfectly immaterial, into the till of a public house."

§ 65. Cases may, indeed, occur, in which the particular character of the depositary may be important, for the purpose, not of furnishing a general rule, but an exception to that rule.[1] In the civil law, it was natural that there should be very great stress laid upon the habits and character of the depositary. In that law gross negligence and fraud were considered as, in most cases, exactly or nearly equivalent to each other.[2] Hence the depositary was not made responsible for any loss, which did not carry with it a just presumption of fraud, actual or constructive.[3] Now, if the depositary did in fact take the same care of the bailed property as of his own, it would go far to repel the presumption of fraud; for no person, however careless, could be presumed to desire the loss of his own property. *Nam et si quis non ad eum modum, quem hominum natura desiderat, diligens est, nisi tamen ad suum modum curam in deposito præstat, fraude non caret.*[4] *Nam enim salvâ fide minorem iis, quam suis rebus, diligentiam præstabit. Sed is ex eo solo tenetur, si quid dolo commiserit. Culpæ autem nomine, id est, desidiæ, ac negligentiæ, non tenetur. Itaque securus est, qui parum diligenter custoditam rem furto amiserit; quia qui negligenti amico rem custodiendam tradit, non ei, sed suæ facilitati, id imputare debet.*[5] On the other hand, if the depositary took better care of his own property than of that bailed, the presumption of fraud would be strengthened. The principle on which this presumption rests is the same, whether the party is a very careless or a very careful person in his own affairs; and it is applicable to other bailments, as well as to deposits.[6] The French law has adopted the same line of reasoning; and therefore Pothier follows it.[7]

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[1] The William, 6 Rob. Adm. 316.

[2] Dig. Lib. 16, tit. 3, l. 32; Id. Lib. 50, tit. 17, l. 23; Lib. 13, tit. 6, l. 5, § 2; Just. Inst. Lib. 3, tit. 15, § 3; Pothier, Pand. Lib. 16, tit. 3, n. 25; Ante, § 20; 1 Domat, B. 1, tit. 7, § 3, art. 2, 3.

[3] Ante, § 20.

[4] Dig. Lib. 16, tit. 3, l. 32.

[5] Inst. Lib. 3, tit. 15, § 3; Dig. Lib. 16, tit. 3, l. 32; 1 Domat, B. 1, tit. 7, § 3. art. 5.

[6] Clark *v.* Earnshaw, Gow, R. 30; Jones on Bailm. 46; Coggs *v.* Bernard, 2 Ld. Raym. 914, 915; Foster *v.* Essex Bank, 17 Mass. R. 479, 498.

[7] Pothier, Traité de Dépôt, n. 23.

His language is in substance to this effect. The fidelity (*fidélité*) which the depositary ought to apply to the care of the thing confided to him, should be the same which he applies to the care of his own. *Nec enim salvâ fide minorem iis* (*rebus apud se depositis*) *quam suis rebus diligentiam præstabit.*[1] Gross negligence in the depositary in respect to the thing confided to him, which is denominated *lata culpa*, is contrary to that fidelity, because it is not credible that the depositary, however careless a person he may be supposed to be, would be guilty of such negligence in his own affairs.[2] The reason why a depositary is not held responsible for ordinary negligence (*la faute légère*[3]) is, that such negligence is perfectly compatible with good faith or fidelity; and when the depositary is a simpleton, or careless man, and subject in consequence thereof to commit the like negligence in his own affairs, it will be sufficient, if he exercises the same care respecting the deposit, that he does as to his own affairs. On the other hand, if the depositary be a man intelligent and careful and attentive in the conduct of his own affairs, he will be responsible, if he does not exercise the same intelligence, care, and attention in regard to the deposit; for, although in such a case the depositary may be guilty only of ordinary negligence, different from fraud (*différente du dol*), abstractly considered, yet, in a depositary, it ought to be deemed a real fraud (*un vrai dol*), and not a simple negligence.[4]

§ 65 *a*. Pothier proceeds to put some cases, presenting illustrations of what he deems the difference between ordinary negligence and gross negligence. Thus (taking a case put in the civil law), he says: If a thing is deposited by a slave, and it

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[1] Dig. Lib. 16, tit. 3, l. 32.

[2] Pothier, Traité de Dépôt, n. 23.

[3] I understand, that Pothier, when he uses the terms "la faute légère," means ordinary negligence; and that, when he means to speak of what we call slight negligence, he uses some other words, or some adjunct, such as *très*-légère. Thus Pothier, in his Traité de Dépôt, n. 26, speaks of faute même légère, and faute très-légère; and again, in n. 27, he says: N'est qu'une faute légère et ordinaire, et non une faute grossière. Pothier, Traité de Dépôt, n. 90.

[4] Pothier, Traité de Dépôt, n. 23, 27; Code Civil of France, art. 1927; 2 Kent, Comm. Lect. 40, p. 564, 4th edit.; Jones on Bailm. 46.

is delivered up to a person supposed to be the owner, when it turns out that he is not so, the depositary will not be responsible; for he has not been guilty of fraud or bad faith.[1] So, in case a house takes fire, in which the goods are lodged, if the depositary omits to remove them, supposing them to be safe, or in the hurry of the calamity forgetting them, especially if his own goods perish also, he will not be responsible for any loss by the fire.[2] But if he should remove his own goods, and not the others, although he had time to remove both, then he would be responsible; for there would arise a presumption of fraud, unless the other circumstances of the case repelled it.[3] The presumption would be still stronger, if the goods saved were of little value, and those lost were of great value, and equally easy to save.[4] If, however, the depositary cannot save both the deposit and his own goods, Pothier thinks that it ought not to be deemed a crime, that he should save his own in preference to the deposit.[5] He also puts a case, as one of clear responsibility of the depositary for gross negligence, where, having a deposit of money, diamonds, or other precious jewels, which are ordinarily kept under lock, he leaves them in an antechamber or vestibule of a house, exposed to all persons who are going and coming, and they are stolen by thieves.[6] Yet, upon his own principles, if the party left his own in the same situation, and they also were stolen, it would repel the imputation of fraud. After all, he is compelled to admit, that, practically speaking, the particular character of the depositary can rarely enter into discussions of this nature, and that the presumption of good faith is usually made in his favor.[7]

§ 66. Our law upon the subject of gross negligence differs from that which is, or is supposed to be, the doctrine of the

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[1] Pothier, Traité de Dépôt, n. 28; Dig. Lib. 16, tit. 3, l. 1, § 32.

[2] Pothier, Traité de Dépôt, n. 29.

[3] Pothier, Traité de Dépôt, n. 29; 2 Kent, Comm. Lect. 40, p. 564, 565, 4th edit.

[4] Ibid.

[5] Pothier, Traité de Dépôt, n. 29.

[6] Pothier, Traité de Dépôt, n. 23; Jones on Bailm. 38.

[7] Pothier, Traité de Dépôt, n. 27; Jones on Bailm. 30, 46, 82, 83; 1 Domat, B. 1, tit. 7, § 3, n. 5; 2 Kent, Comm. Lect. 40, p. 564, 565, 4th edit.

civil law; for gross negligence, although it may sometimes be presumptive of fraud, and undistinguishable from it, yet may consist with perfect innocence of intention.[1] Hence it is no defence to a depositary, that he has acted with good faith, if in truth he has been guilty of gross negligence. In the case of the diamonds, above put, the depositary would by our law be liable for gross negligence, even although his own were left in the same place; since such articles are usually kept in more secure places; and every depositary must be presumed to undertake for reasonable care, with reference to the nature of the things bailed.[2] Sir William Jones[3] admits this; and Domat seems to deduce this as the true exposition of the civil law.[4] *Latæ culpæ finis est, non intelligere id, quod omnes intelligunt*, says the Digest;[5] which seems to admit, that the depositary may be guilty of gross negligence who omits those precautions which persons of common care or intelligence would naturally adopt, even though the depositary might ordinarily, in regard to his own goods, omit them. Cases may, indeed, be put, in which the circumstances of extreme rashness on the part of the depositor are so strong as justly to create an exception to the general rule of law, or rather a dispensation from it. As if the depositor should knowingly intrust his diamonds, or other valuables, to a man notoriously weak and infirm in judgment, or to a minor without any experience or discretion, or to a man grossly negligent and prodigal in his own affairs, or subject to an absence of mind, bordering on derangement,[6] or to a person given to habitual intoxication, and, from these known infirmities, the thing bailed should be innocently lost; in such a case, there might be strong ground to presume that the depositor was content to intrust the party, with all his faults and infirmities, and to take upon himself

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[1] Ante, § 19, 20 a, 20 b, 31.

[2] Ante, § 64 a.

[3] Jones on Bailm. 38, 39.

[4] 1 Domat, B. 1, tit. 7, § 3, art. 4, 5. But see Id. art. 2, 3.

[5] Dig. Lib. 50, tit. 16, l. 223; 2 Kent, Comm. Lect. 40, p. 562, note (*b*), 4th edit.; 1 Domat, B. 1, tit. 7, § 3, art. 4.

[6] But see Morse *v.* Crawford, 17 Verm. 499.

the responsibility of all losses not arising from actual fraud.[1] At least, it might fairly be put to a jury to presume a special contract in such a case, that the depositary should take the same care as he did of his own property, and no more, and that he should not be responsible except for fraud.[2] But these cases do not impugn the general rule. They turn upon circumstances which imply a waiver of it, or a substitution of a different contract for that implied by the law.

§ 67. The doctrine here stated has also the sanction of adjudged cases in its support. Thus, where a gratuitous bailee put a horse of his brother into a pasture with his own cattle in the night-time, and by reason of a defect of fences the horse fell into a neighboring field and was killed; it was thought that he was responsible to the owner, because it was gross negligence to put the horse into a dangerous pasture, to which he was unused.[3] So, in the case of the painting, before referred to, where it appeared that it was injured by being kept in a damp room, next to a stable, it was held that the party was liable for gross negligence; and that the law, in the case of a deposit, will raise an implied promise that the party will not grossly neglect or abuse the deposit.[4] In other words, the depositary is bound to reasonable care. The true way of putting cases of this nature is, to consider whether the party has omitted that care which bailees without reward are usually understood to take of property of the like nature. This was the very manner in which the point was presented in the case of Doorman *v.* Jenkins, before mentioned, where it was in effect put to the jury to say, whether the defendant (the coffee-house keeper), who had put the plaintiff's money into the same cash-box with his own, had taken such care as a reasonable man would ordinarily take of his own.[5] Upon the same ground, where a person had a deposit of money, and put it with his

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[1] 1 Domat, B. 1, tit. 7, § 3, art. 5; Just. Inst. B. 3, tit. 15, § 3; Ante, § 65.

[2] The William, 6 Rob. Adm. 316; Ante, § 65; Post, § 67.

[3] Rooth *v.* Wilson, 1 Barn. & Ald. 59.

[4] Mytton *v.* Cook, 2 Str. 1099; Ante, § 63.

[5] Doorman *v.* Jenkins, 2 Adolph. & Ellis, R. 256; s. c. 4 Nev. & Manr 170; Ante, § 64 a.

own in a valise on board a steamboat, and left it there in an exposed situation all night, and it was stolen, and his own money was left, he was held responsible for gross negligence. But, if he had left it for a moment only, under ordinary circumstances, and no pressing danger, it would have been otherwise.[1] Lord Stowell, in a case of justifiable capture, where the captors are held responsible for due (that is, for reasonable) diligence, has expressed himself with great clearness on this subject. "On questions of this nature," says he, "there is one position sometimes advanced, which does not meet with my entire assent; namely, that captors are answerable only for such care as they would take of their own property. This, I think, is not a just criterion in such case; for a man may, with respect to his own property, encounter risks from views of particular advantage, or from a natural disposition of rashness, which would be entirely unjustifiable in respect to the custody of the goods of another person, which have come to his hands by an act of force. Where property is confided to the care of a particular person, by one who is, or may be supposed to be, acquainted with his character, the care which he would take of his own property might, indeed, be considered as a reasonable criterion."[2] Certainly it might if such character was known, and the party under the circumstances might be presumed to rely, not on the rule of law, but on the care which the party was accustomed to take of his own property in making the deposit. But, unless he knew the habits of the bailee, or could be fairly presumed to trust to such care as the bailee might use about his own property of a like nature, there is no ground to say, that he has waived his right to demand reasonable diligence. Why should not the rule of the civil law be applied to such a case? *Latæ culpæ finis est, non intelligere id, quod omnes intelligunt.*[3]

§ 68. Lord Coke has adopted a doctrine somewhat different

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[1] Tracy *v.* Wood, 3 Mason, R. 132.

[2] The William, 6 Rob. Adm. 316. But see 2 Kent, Comm. Lect. 40, p. 562, note (*a*), 4th edit.

[3] Dig. Lib. 50, tit. 16, l. 223; Ante, § 66. See the same point in Doorman *v.* Jenkins, 2 Adolph. & Ellis, 256; s. c. 4 Nev. & Mann. 170.

in its bearing; but certainly leading to the conclusion, that to keep, as one keeps his own property, is not the proper intendment of law in cases of deposit.[1] In his Institutes, he says, that in cases of deposit the engagement of the bailee is to keep safely; "for if goods are delivered to one to be kept, and to be safely kept, it is all one in law."[2] Hence he concludes, that if goods are delivered a man to be safely kept, and afterwards those goods are stolen, this shall not excuse him, because by the acceptance he undertook to keep them safely, and therefore he must keep them at his own peril. But if the goods are delivered to him to keep, as he would keep his own, there, if they are stolen from him without his default or negligence, he shall be discharged.[3] And he recommends, on this account, to those who receive goods, that they should receive them in a special manner, namely, to be kept as their own, or at the peril of the owner.[4]

§ 69. Lord Coke considered it to be the settled law in his time, that in cases of deposits the depositary undertakes to keep the goods safely, whether the language used on the occasion be, that they are to be kept, or to be kept safely;[5] and he mainly relies for the support of this position upon Southcote's case.[6] That case, according to his own report, was as follows: Southcote brought detinue against Bennet for certain goods, and declared that he delivered them to the defendant to keep safe; the defendant confessed the delivery; and pleaded in bar, that, after the delivery, one J. S. stole them feloniously out of his possession; the plaintiff replied, that the said J. S. was the defendant's servant, retained in his service, and demanded judgment; and, upon a demurrer in law, judgment was given for the plaintiff. And the reason or cause of the judgment was, because the plaintiff delivered the goods to be safely kept, and the defendant had taken it (the risk) upon

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[1] Post, § 73.
[2] Co. Litt. 89 a; 1 Dane, Abridg. ch. 17, art. 1, § 3.
[3] Co. Litt. 89 a; Post, § 73.
[4] See 2 Black. Comm. 452.
[5] Post, § 72, 73.
[6] 4 Rep. 83 b, 84; s. c. Cro. Eliz. 815.

him by the acceptance upon such delivery, and therefore he ought to keep them at his peril; although, in such a case, he should have nothing for his safe keeping. This is the substance of the case; and Lord Coke, in the sequel, proceeds to expound his own views of the general doctrine, as above stated, with that superabundance of learning for which he was so remarkable.

§ 70. The decision in Southcote's case has been subjected to much minute criticism;[1] but it is far from being clear that Lord Coke misunderstood the case, or the principles upon which the Court decided it. The decision may itself be correct, although, in the reasoning of the Court, principles may have been avowed which cannot now be supported. In his first Institute, Lord Coke declares, that all these cases were resolved and adjudged in the King's Bench in Southcote's case.[2] The real point of decision in this case was, that, upon a bailment to keep safely, the bailee was responsible for a loss occasioned by theft, whether the theft was by his servants or by others.[3] Now, this decision depends, as has been before stated, not upon any general principle of law, but upon the import and effect of an undertaking to keep safely. Lord Holt manifestly dissented from Southcote's case; and two of the other judges seem to have agreed with him in that dissent.[4] There are also earlier authorities, which countenance a different doctrine.[5] But the latest case in England seems to admit the general correctness of Southcote's case in the point actually in judgment.[6]

§ 71. A strong doubt is, however, thrown over the decision by a very elaborate judgment in one of our own courts.[7]

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[1] Jones on Bailm. 41, 42, 43; 2 Kent, Comm. Lect. 40, p. 563, 564, 4th edit.

[2] Co. Litt. 89, b. The report of the same case in Cro. Eliz. 815, confirms Lord Coke's statement of the point decided; but goes no further.

[3] 1 Dane, Abridg. ch. 17, art. 1, § 4; art. 11, § 3.

[4] Coggs *v.* Bernard, 2 Ld. Raym. 909–912, 914, 915.

[5] Doct. and Stud., Dial. 2, ch. 38; Williams *v.* Lloyd, 1 Jones, 179; s. c. Palmer, R. 549; 22 Liber Assisarum, 41.

[6] Kettle *v.* Bromsall, Willes, R. 118.

[7] Foster *v.* The Essex Bank, 17 Mass. R. 479, 500. But see Noy's Maxims, ch. 43.

The learned Judge, who delivered the opinion of the Court on that occasion, seemed to think, and there is much to warrant the suggestion, that, in a case where the bailment is to keep safely, the depositary would not be liable for a loss by theft, unless it should arise from his own negligence and want of due diligence and care.[1] [So, where a promissory note was delivered to a bailee on his voluntary undertaking, without reward, "to secure and take care of it," it was held, by the same Court, that he was not bound to any active measures to obtain security, but was simply bound to keep the note carefully and securely, and receive the money due thereon, when offered; and that the owner could not recover of him for the loss thereof, without proof of fraud or gross negligence.[2]] Mr. Justice Blackstone, in his Commentaries, seems to hold a similar modified opinion. He says, that "If he [the bailee] undertakes specially to keep the goods safely and securely, he is bound to the same care as a prudent man would take of his own;"[3] that is, he is bound to ordinary diligence. Sir William Jones,[4] as we have already seen, thinks that theft is presumptive proof of ordinary negligence; but he admits, that, upon proof of ordinary diligence, the bailee in such a case would not be chargeable.[5]

§ 72. But all the later authorities explode the doctrine, that an undertaking to keep, and an undertaking to keep safely, amount to the same thing. It was expressly overruled in Coggs *v.* Bernard.[6] And in a very early case in the Year Books it was held, that if goods be bailed to a party to keep, and he puts them among his own goods, and they are stolen, he is not chargeable with the loss.[7] This, of course, must be subject to the exception, that the theft is not by gross neglect.

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[1] 1 Dane, Abridg. ch. 17, art. 11, § 3, is to the same effect.

[2] Whitney *v.* Lee, 8 Metcalf, R. 91.

[3] 2 Black. Comm. 452.

[4] Jones on Bailm. 39, 40, 43, 44, 119; Ante, § 38, 39.

[5] Ibid.

[6] 2 Ld. Raym. 909, 910, 911, 914, 915; The King *v.* Hertford, 2 Show. R. 172 [184].

[7] 29 Liber Assisarum, 28; Brook, Abridg. tit. *Bailments*, 7. See 1 Dane, Abridg. ch. 17, art. 7.

§ 73. The general doctrine, however, of Lord Coke, that, if a man accepts goods to keep as his own, he is not responsible for losses by theft, is confirmed by later authorities. It is treated, however, as he treats it, not as an undertaking resulting from the general law of deposit, but as a special undertaking, limiting the common responsibility created by law.[1] In many cases this consideration may become important; and especially where the bailee is notoriously very careless and indifferent about his own affairs; in which case, the depositor might fairly be presumed to know his habits, and to trust to such care as the bailee takes of his own goods.[2]

§ 74. In like manner, if the depositor agree, that the goods may be kept in a particular place, as on a ship's deck, or in a ship's cabin, he cannot afterwards object, that the place is not a safe one; for his assent amounts either to a qualification of the contract for safe custody, or to an agreement, that for all the purposes of the deposit the place shall be deemed sufficiently safe. But if the depositary does, in such a place, expose the deposit to undue perils, or he is guilty of gross negligence, whereby it is stolen, he will be responsible for the loss. Thus, if a deposit of money is made with the master of a ship, with an assent, that he may place it in his cabin for safe custody; and he does so; but he afterwards exposes the place where the money is concealed, in the presence of suspicious persons, and enables them to know the fact, that money is there; or if he leaves the cabin wholly unguarded during a considerable portion of the night, under circumstances calling for more precaution, and the money is stolen; he will, under such circumstances, be deemed guilty of gross negligence, and held responsible for the loss.[3]

§ 75. There is a question often treated of under this head, which is not merely curious, but important; and that is,

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[1] Southcote *v.* Bennet, Cro. Eliz. 815, 4 Rep. 84; Kettle *v.* Bromsall, Willes, R. 118; Coggs *v.* Bernard, 2 Ld. Raym. 909, Powell's opinion; Ante, § 68.

[2] Ante, § 65, 66.

[3] Bradish *v.* Henderson, 1 Dane, Abridg. ch. 17, art. 11, § 4. See also, Nelson *v.* Mackintosh, 1 Starkie, R. 238; Post, § 190.

whether a depositary is responsible for the loss of articles contained in a package, the contents of which are unknown to him.[1] If, for instance, a sealed box or locked casket containing jewels, be deposited, and the depositary has no knowledge that it contains jewels. The Roman lawyers discussed this question with a good deal of acuteness and ability. In the Pandects we find the following case and reasoning: If a sealed box is deposited, is the box only to be demanded in an action, or may the clothes contained in it be comprehended? Trebatius says, that the box only, and not the particular contents of it, must be sued for as a deposit. But if the contents were previously shown, and then the box were deposited, the contents might be added and specified. But Labeo asserts that he who deposits the box seems to deposit the contents also; and therefore he ought to sue for the contents. What, then, if the depositary was ignorant what the contents were? It is not of much consequence, since he has accepted the deposit. And I am of opinion (says Ulpian) that he has a right to sue for the deposit of the contents although the sealed box was deposited.[2] Domat adopts the doctrine of Trebatius.[3] The Scotch law arrives at the same conclusion.[4] The case, as put in the Pandects, seems principally to have reference to the nature of the suit, or the form of the libel; but it is obvious that the difference of opinion among the Roman jurists was not confined to this merely technical point.[5]

§ 96. Bonion's case, in the Year Books,[6] may be supposed to bear upon this question. It is as follows: Bonion brought his writ of detinue for certain goods, to wit, seals, plate, and jewels, against M. The defendant pleaded, that Bonion bailed to him the chest under lock to keep, and took away the key, and that he did not know that the jewels and other things were therein; and thieves came in the night, and broke open

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[1] See 1 Dane, Abridg. ch. 17, art. 6, § 2.

[2] Jones on Bailm. 38, 39; Dig. Lib. 16, tit. 3, l. 1, § 41.

[3] 1 Domat, B. 1, tit. 7, § 1, art. 17.

[4] Ersk. Inst. B. 3, tit. 1, § 26, p. 490.

[5] Jones on Bailm. 38, 39.

[6] Mayn. Year Book, Edw. 2, p. 275; Fitz. Abridg. *Detinue*, 59.

the chamber of the defendant, and carried away the chest into the fields, and broke it open, and at the same time took and carried away the goods of the defendant with the other goods. The plaintiff replied, that the jewels, &c., were delivered without being locked up (*hors d' enclosure*), to be returned, at his pleasure; and upon this issue was joined. The case is a little differently reported by Fitzherbert, in his Abridgment, who says, that the party was driven to reply, that the goods were not carried away by thieves.[1] Sir William Jones seems to suppose this case to be wholly incomprehensible,[2] and incapable of any rational explanation. If the case, however, turned upon the point of the issue suggested by Fitzherbert, namely, that the loss was not by thieves, there is nothing in it which is not sound law. For if the plea was falsified in a material fact, the action was clearly maintainable. It is true that the compiler of the table to that Year Book relies on a distinction, that, "If a casket sealed be delivered to me, in which there are jewels, and thieves in the night rob me, and take them, I am not answerable; but that it is otherwise, if the jewels were delivered to me, and I put them into a chest."[3] But this distinction has no foundation in the case. And even if the account in that Year Book be the correct one, it shows no more than that the plaintiff chose to put his case upon an immaterial issue. Fitzherbert, in his Abridgment, refers to another case,[4] which shows that the established law then was, that, if a party receives goods to keep, and he keeps them as his own, he is not chargeable, even in a case of theft.

§ 77. The question, however, which divided the Roman lawyers, would, in our law, admit of different determinations according to circumstances. (1) If the bailee knew that the box or casket contained jewels, although the bailor took away the key, he would be bound to a degree of diligence proportioned to the value of the contents.[5] In other words, the same

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[1] Fitz. Abridg. *Detinue*, 59.
[2] Jones on Bailm. 36 to 39.
[3] Jones on Bailm. 39, 40.
[4] Fitz. Abridg. *Accompt*, 11; 9 Edw. 4, 40; Ante, § 38.
[5] Jones on Bailm. 38, 39.

degree of care which would ordinarily be required to be taken of such valuables, when deposited, would be exacted of him.[1] (2) If he had no ground to suppose that the box or casket contained any valuables whatsoever, he would be bound only to such reasonable care as would be required of depositaries in cases of articles of common value.[2] And under such circumstances, if he were guilty of gross negligence, he would be held responsible for the loss, at least to the extent of what he might fairly presume to be the value of the contents. (3) If, on the other hand, there was a meditated concealment of the contents of the box or casket from the bailee, with a view to induce him to receive the bailment, and he would not have received it, or have exposed it, as he did, if he had been made acquainted with the facts, then the transaction would be deemed a fraud upon him; or, at least, the loss would be deemed one occasioned by the bailor's own folly or laches; and the bailee would not, even in a case of gross negligence, be responsible beyond the value of the box or casket itself, without the contents.

§ 78. The first two of these propositions may be deduced from the comments of Lord Holt, in the case of Coggs *v.* Bernard.[3] The last seems established by the prevailing doctrine in respect to carriers, who give notices, and thereby limit their responsibility, when packages are intrusted to them, the contents of which are unknown or concealed, upon which we shall have occasion to enlarge hereafter, when we come to that highly important branch of bailments.[4] And there is sound reason for the distinction thus made, in point of responsibility, in the different cases. No person has a right, by practising concealment or fraud, to impose a duty upon another, which he would not knowingly have undertaken. On the other hand, no person, knowing, or having reason to presume, the contents of a

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[1] Jones on Bailm. 38, 39.

[2] Ibid.

[3] 2 Ld. Raym. 909, 914, 915.

[4] Batson *v.* Donovan, 4 Barn. & Ald. 21; Sleat *v.* Fagg, 5 Barn. & Ald. 342; Bradley *v.* Waterhouse, 1 Mood. & Malk. 454; Gibbon *v.* Paynton, 4 Burr. 2298; Post, § 554, 556, 557, 563, 565, 566, 567.

box to be of very high and tempting value, has a right to excuse himself from a just responsibility, because the contents have not been formally communicated to him, and a request formally made, that he will undertake the custody of the whole; since he may naturally presume that such is the intention of the depositor, notwithstanding the security of a lock or seal; and good faith requires him, under such circumstances, not to disappoint the just confidence of the party. But if he has no reason to suppose the contents to be of more than ordinary value, and there is nothing communicated which calls for superior vigilance, then he may fairly discharge himself by such care as belongs ordinarily to trusts of that sort.

§ 79. The general rule, then, being, that the depositary is bound to reasonable care, proportioned, indeed, to the nature and value of the article, and the danger of loss, and the measure of that care being slight diligence, the result is that he is generally liable for gross negligence only. If he takes the same care of the goods bailed as of his own, that ordinarily will repel the presumption of gross negligence; but he may still be chargeable, if the negligence is such, as even persons of slight diligence would not be guilty of.[1] In short, he must exert the common diligence used by, and required of, depositaries in general; and he cannot exempt himself from the consequences of omitting such diligence, unless he can deduce a more limited liability from all the circumstances of his own particular case.[2] He may make a special contract, either to narrow or to enlarge his general responsibility.[3] And then, in case of a loss, it will be incumbent on the party, who seeks to avail himself of the benefit of such a contract, to establish it by suitable proofs. It will be rare, that such a contract can be expressly proved. It is usually implied from collateral circumstances, which afford presumptions varying almost infinitely in cogency and strength. We have already seen, that the depositary's own character for diligence or carelessness may some-

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[1] Ante, § 63 to 67, 71, 73.

[2] Jones on Bailm. 82, 83; Ante, § 64 a.

[3] Dig. Lib. 50, tit. 17, § 23; Jones on Bailm. 47, 48.

times form an ingredient in the case, to negative or to support a presumption.[1] The proof must be strong, which will justify an inference that the bailee is at liberty to take less care of the thing bailed than of his own. And in many cases, a higher diligence may properly be exacted than the bailee is accustomed to take of his property, especially if his character in this respect is not thoroughly known to the bailor.[2]

§ 80. Some exceptions to the general rule of diligence, in cases of deposits, are laid down by elementary writers.[3] But where the case is in strictness a deposit, they all resolve themselves into the following. (1) Cases where there is a special contract; (2) Cases where there is a spontaneous and officious offer by the depositary to keep the deposit, without any previous request on the part of the depositor.[4]

§ 81. The first exception requires no commentary; for the rule promulgated in the civil law seems the rule of universal justice. *Si convenit, ut in deposito et culpa præstetur, rata est conventio; contractus enim legem ex conventione accipiunt.*[5] Or, as it is expressed in another place, *Si quid nominatim convenit, vel plus, vel minus, in singulis contractibus, hoc servabitur, quod initio convenit. Legem enim contractus dedit.*[6] The other exception is deserving of much consideration. Sir William Jones[7] states it to be a rule of our law, that the depositary is liable for losses, where he has made an officious offer, although he does not cite any other authority in support of it than the Roman law. The rule certainly existed in the Roman law. The Pandects adopted the doctrine of Julian on this subject. *Sed, etsi se quis deposito obtulit (idem Julianus scribit), periculo se depositi illigasse; ita, tamen, ut non solum dolum, sed etiam culpam et custodiam, præstet; non tamen casus fortuitos.*[8] So

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[1] Ante, § 63, 64, 65.

[2] Ante, § 65, 66.

[3] Pothier, Traité de Dépôt, n. 30 to 33; 2 Kent, Comm. Lect. 40, p. 565, 4th edit.

[4] 2 Kent, Comm. Lect. 40, p. 565, 4th edit.; Jones on Bailm. 47 to 49.

[5] Dig. Lib. 16, tit. 3, l. 1, § 6; Pothier, Traité de Dépôt, n. 30.

[6] Dig. Lib. 50, tit. 17, l. 23; Jones on Bailm. 47, 48.

[7] Jones on Bailm. 48, 50.

[8] Dig. Lib. 16, tit. 3, l. 1, § 35; Ayliffe, Pand. B. 4, tit. 17.

that the party was liable, not merely for fraud, but for negligence, or at least for ordinary negligence, although not for accidents. Domat[1] says, that the depositary in such a case is liable, not only for gross mistakes, but for other faults. The reason assigned for this doctrine is, that the depositor might, but for such officiousness, have chosen another depositary, who would have been more careful.[2] Pothier adopts the Roman rule without comment or question. He holds, that, in such a case of an officious offer without request, the party is bound to keep the deposit with all possible care, since he has thereby prevented the depositor from delivering it to a person who would have been more careful than he.[3]

§ 82. The rule is certainly *strictissimi juris;* and the incorporation into our law ought not readily to be admitted. A voluntary offer of kindness to a friend, even when importunely urged, ought hardly to carry with it such penal consequences; since it is generally the result of strong affection, and a desire to oblige, and often of a sense of duty, especially in cases of imminent peril or sudden emergency.[4] The reason assigned for the rule is not satisfactory. It might, with at least as much force, be said, that he who trusts such a deposit to a friend at his urgent request, confides it to him as a proof of his personal confidence, and requires no more than that he should guard it as he guards his own, or at least as men ordinarily guard deposits. He does not mean to place a burden on his friend, by which extraordinary responsibility is to be incurred; but to manifest a personal confidence in the character and caution of his friend. Sir William Jones has himself quoted, with apparent approbation, the opinion of Labeo, in the stronger case of a *Negotiorum Gestor*,[5] in which Labeo requires no more

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[1] 1 Domat, B. 1, tit. 7, § 3, art. 8; Vinn. Lib. 3, tit. 15, § 12.

[2] 1 Domat, B. 1, tit. 7, § 3, art. 8; Jones on Bailm. 48.

[3] Pothier, Traité de Dépôt, n. 30.

[4] See 2 Kent, Comm. Lect. 40, p. 565, note (b).

[5] The Negotiorum Gestor in the civil law is one who spontaneously, and without authority, undertakes to act for another during his absence, in his affairs. Dig. Lib. 3, tit. 5; Pothier, Pand. Lib. 3, tit. 5, n. 1 to 18; 1 Bell, Comm. § 202, note (1), 4th edit.; 1 Bell, Comm. p. 260, 5th edit. Of course, as his acts are

than good faith of him, when he interferes officiously, but from pure kindness, to act in my affairs. *Nam si affectione coactus, ne bona mea distrahantur, negotiis te meis obtuleris; æquissimum esse dolum duntaxat te præstare.*[1] The good sense of this, as a general rule, interpreting the offer of the party in its fair intendment, would seem more to belong to the manliness of the common law, than the rule promulgated by Julian, even with all the authority of imperial wisdom added to it. The modern Code of France introduces a mitigated form of the rule; for having announced that a depositary must bestow, in keeping the thing deposited, the same care which he bestows in keeping his own property, it proceeds to declare that the rule thus promulgated is to be applied with more rigor, if the depositary has himself offered to receive the deposit.[2] It seems thus to insist upon a high degree of diligence, without changing the ordinary obligations arising from deposits; that is, it seems to require at least as high a degree of diligence as the depositary employs about his own property, construed in a rigorous sense, without absolutely changing the ordinary degree of diligence. The Code of Louisiana uses language somewhat different. It says: "The depositary is bound to use the same diligence in preserving the deposit that he uses in preserving his own property." It then adds: "The provision in the preceding article is to be rigorously enforced, when the deposit has been made at the request of the depositary."[3] Perhaps this does not in effect differ from the intent of the French Code.

§ 83. In respect to cases of necessary deposits, that is, such as are suddenly and almost involuntarily made by the depositor, in cases of extraordinary peril and difficulty, such as in cases of fire, shipwreck, inundations, insurrections, attacks by

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wholly without the assent of the owner, the case is much stronger than that of a depositary, who officiously interferes in another's affairs with his consent. Post, § 189; Pothier, Contrat de Mandat, n. 167; Pothier, Pand. Lib. 3, tit. 3, n. 2.

[1] Jones on Bailm. 49; Dig. Lib. 3, tit. 5, l. 3, § 9; Pothier, Pand. Lib. 3, tit. 5, n. 52.

[2] Code Civil, art. 1927, 1928.

[3] Code of Louisiana (1825), art. 2908, 2909.

mobs, and other casualties and pressing emergencies, our law does not seem to vary the responsibility of the bailee from that which arises under ordinary circumstances.[1] Nor, indeed, does the Roman Law, as to the degree of diligence required; but it only inflicts a double compensation for any misconduct of the bailee, upon the ground that public policy requires that perfidy in such cases should be punished, so as to suppress the temptation to commit wrong.[2] Our law contents itself with an ample compensation for the actual injury or loss, leaving the additional moral infamy, which attaches to cases of extraordinary perfidy to be punished by the severe judgment of public disgrace, which inevitably follows it. The French law does not, in principle, differ from ours in cases of necessary deposits, applying the general rule of responsibility to them.[3] The only circumstance in that law, in which a necessary deposit differs from a common deposit, is, that oral proof by witnesses is admitted, whatever may be the value of the necessary deposit, whereas in other cases no deposit beyond a limited value can be proved but by some writing.[4]

§ 83 *a*. There is another class of deposits alluded to in a former page, which indeed might, in one sense, fall under the head of necessary deposits, but which we have ventured to call involuntary deposits.[5] Such is the case, where lumber, floating in a river, is by a sudden flood or freshet lodged on the land of a stranger, and left there by the subsidence of the stream. Such also is the case of trees blown by a tempest upon the land of a stranger; and also of goods lodged in the like manner by a whirlwind or tornado in a distant field of a stranger. What is the duty of the owner of the land in all such cases, as to the protection or preservation of the property,

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[1] Jones on Bailm. 48, 49; 1 Domat, B. 1, tit. 7, § 5; Code of Louisiana (1825), art. 2935.

[2] 3 Dig. Lib. 16, tit. 3, l. 3, § 1 to 4; 1 Domat, B. 1, tit. 7, prelim. art., and tit. 7, § 5; Jones on Bailm. 48, 49; Pothier, Traité de Dépôt, n. 76.

[3] Code Civil, B. 3, tit. 11, art. 1949, 1950, 1951; Pothier, Traité de Dépôt, n. 75; 1 Domat, B. 1, tit. 7, § 5, art. 3.

[4] Pothier, Traité de Dépôt, n. 76; Code Civil, B. 3, tit. 11, art. 1924, 1950.

[5] Ante, § 44 a.

does not appear to be settled by any distinct decisions of the common law. But some curious questions have recently arisen, as to the rights of the owner of the lumber, or trees, or other goods. May he lawfully enter upon the land, and reclaim and retake his property, doing as little damage to the herbage or soil as possible? Or is he bound to ask leave of the owner? May the latter lawfully refuse such leave? Or will a refusal to give such leave amount to a conversion of the property? If the owner suffers the goods to remain without any effort to remove them, will it amount to a trespass or other ground of action? These, and many other questions, may arise out of such calamitous occurrences; and the inquiry, what are the true rights and duties of the parties, is a matter not unattended with difficulty. Such accidents are by no means uncommon on our great American rivers. There seems to be strong reason to hold, that, where the goods of any person have by an unavoidable casualty or accident been lodged upon another's land, the owner may lawfully enter and take them away, doing as little damage as he may. But, where the goods come upon the land by the act or negligence of the owner, there he cannot justify an entry at all, or at all events, not without leave first asked. Thus, it has been held, that, if trees are thrown by the wind on the land of a stranger, the owner may enter and take them away; but if in cutting them down they fall into a stranger's land, that it is a trespass.[1] So, if fruit falls from a tree into another's land, by the force of the wind or other accident, there the owner of the tree may lawfully enter and gather it up, doing as little damage as he can, and staying there only a convenient time; for it is a case of necessity.[2] Upon a like ground, it would seem reasonable, that, if timber is carried by a sudden flood or freshet in a river, where it is moored or floating, upon the land of a stranger, there the owner may enter and take it away.[3] But, if the

[1] See Year Book, 6 Edw. 4, 7; Millen *v.* Hawery or Fawdry, Latch, R. 13, 14; s. c. Latch, R. 119, 120; s. c. Popham, R. 161; 20 Viner, Abridg. *Trespass*, H. a 2, pl. 11; Anthony *v.* Haney, 8 Bing. R. 186.

[2] See Millen *v.* Hawery or Fawdry, Latch, R. 120; s. c. Latch, R. 13; s. c. Popham, R. 161.

[3] Year Book, 6 Edw. 4, 7; Millen *v.* Hawery or Fawdry, Latch, R. 13, 14; s. c. Latch, R. 119, 120; s. c. Popham, R. 161.

timber is drifted by his negligence or wilful act upon the land, there it is a trespass for which he will be held liable. The same rule may probably be held to apply, where the owner, after due notice, refuses to remove his timber from the land, although it has been carried there by an inevitable casualty. And in the like case, if the owner of the land improperly refuses, after a request from the owner of the timber, to permit him to remove it, it may be held a conversion thereof, on his part, for which trover will lie.[1] In respect to the duty of the owner of the land to preserve the property, thus by accident thrown

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[1] See Anthony *v.* Haney, 8 Bing. R. 186; Nicholson *v.* Chapman, 2 H. Black. 254.— This whole subject was very ably discussed by the Supreme Court of the Province of New Brunswick, in the case of Read *v.* Smith, 1 Berton's Rep. 194, and by a learned writer in the American Jurist, for January, 1839 (vol. 20, p. 328 to 332). The following citation from the latter will be found exceedingly useful: "Generally, it is true, the owner of property is protected in the exclusive enjoyment of it. But not universally, for there are many cases, in which this right of the owner must yield to that service, which the members of the same community may have in each other's lands under peculiar circumstances. From the earliest days of the common law, of which we have any judicial records, four classes of cases have been recognized, as justifying an entry into another's close. 1. The first is, where the entry was to save life. 'If one be assaulted, and like to be killed, and he flye through my ground to save his life, I may not sue him for this.' (37 H. 5, 37, cited in 4 Shep. Abr. 136.) The principle of this case, we think, would extend to the life of any other person than the defendant, which he might be endeavoring to save. 2. Where the object of the entry was to avert or prevent a common danger; such as fire, flood, attack of enemies; or the destruction of dangerous or mischievous beasts of prey. (21 H. 7, 27; Dyer, 36 b; 12 H. 8, 2; Bro. Tresp. 40; 4 Shep. Abridg. 136, 137.) 3. Where it was for the purpose of staying and arresting felons, or preserving the public peace. (4 Shep. Abridg. 137; Bro. Tresp. 327, 354.) These and the last-mentioned cases may be referred to one common principle, the public safety. 4. Where it was to identify and retake things stolen. (4 Shep. Abridg. 138; Higgins *v.* Andrews, 2 Roll. Rep. 55.) In the latter case, the point was expressly limited to things stolen, excluding merely tortious takings. To these we think may be added a fifth class, comprising the cases of necessary or involuntary bailment: where the goods of one man, by the superior and overpowering force of the elements, or by ungovernable brute force, are carried on to the land of another. This may be referred to the supposed fundamental principles of the social compact; or to the necessities, or the tacit consent of society; or to the demands of our common religion. In 6 Ed. 4. 8, it was said by Choke, J., that, if the wind blows my tree

upon his land, it would probably be held, that it was of the same nature and extent as that of an ordinary finder of goods.[1]

§ 84. There is another class of deposits, noticed by Pothier, and called by him irregular deposit. This arises, when

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upon the land of another, I may enter and take it, and it is no trespass; for it was the act of the wind, and not of me. (See also, Nicholson *v.* Chapman, 2 H. Bl. 254.) And with this agrees the Roman law; by which the proprietor of ground, on which the property of another is carried by a flood, is obliged to suffer him who had the loss to take away what remains, and to allow him such free access to his ground as is necessary for that purpose. But the owner of the goods is bound to indemnify the owner of the land for all damage occasioned by their lying there, and by the act of removing them. Yet, if he chooses not to take the goods away, he is not liable. (Domat's Civil Law, B. 2, tit. 9, § 2, art. 3, 4.) The same doctrine is laid down by Mr. Hammond. (Hammond's N. P. 168, § 3.) The case of cattle escaping, without the owner's fault, or driven by a dog, against the owner's will, into the close of another, falls under the same principle; and so it has been repeatedly held. Such a justification, in trespass, was held good, in 21 Ed. 4, 64, pl. 37. (See acc. Millen *v.* Fandrye, Poph. 161; Beckwith *v.* Shordike, 4 Burr. 2092; Deane *v.* Clayton, 7 Taunt. 489; Dovaston *v.* Payne, 2 H. Bl. 527; Latch, R. 120.) The cases cited below were decided upon the ground that the defendant's property came into the plaintiff's close, without any direct or immediate human agency, and without any fault of the owner of the goods; in which case he is not obliged to ask leave of the proprietor of the close, in order to enter and take them; and therefore is not a trespasser in so doing, whatever remedy the latter may have, in another form, for remuneration of his actual damage. Where the goods of one are placed within the close of another by human agency, the right of the owner to enter and take them will depend on the manner of their coming there. It may have been by the fault of the owner of the land; or of the owner of the goods; or equally of both; or of a stranger. In the first case, the owner of the goods may lawfully enter and retake them. (Bro. Abridg. *Trespass*, pl. 186; 2 Roll. Abridg. 565, pl. 9; Houghton *v.* Butler, 4 T. R. 365.) In the second case, he may not. In the third case, he may; if, for example, the cattle of the defendant escaped through a defective partition fence, maintainable jointly by both parties. (1 Dane, Abridg. 134, § 13.) In the fourth case, the owner of the land must be connected with the tort of the stranger, by a demand and refusal; in which case it becomes his own tort by subsequent assent. The assent of the plaintiff seems to have been an essential element in the case of Chapman *v.* Thumblethorp (Cro. El. 329), in which a plea in bar to an action of trespass, stating that the defendant's beasts were wrongfully taken by a stranger, and, with the plaintiff's assent, driven into the locus in quo, into which he entered to retake them, was, on demurrer, held a justification."

[1] Post, § 85 to 88. See also, Nicholson *v.* Chapman, 2 H. Black. 254.

a party, having a sum of money which he does not think safe in his own hands, confides it to another, who is to return to him, not the same money, but a like sum, when he shall demand it.[1] An irregular deposit differs from a *mutuum* simply in this respect, that the latter has principally in view the benefit of the borrower, and the former the benefit of the bailor.[2] In the civil law, the obligations springing from these contracts were different; for in cases of *mutuum*, the party borrowing was not held to pay interest upon the money lent; but in cases of irregular deposit, interest was due by the depositary, both *ex nudo pacto* and *ex morâ*.[3] These distinctions are not recognized, at least not practically, in the French law; nor, as it is believed, in the common law. In both cases, interest is by the French law due *ex morâ*.[4] In the common law the payment of interest is not generally fixed by positive rules; but interest is usually allowed upon money lent, if detained beyond the proper period, at which it ought to be repaid. And whether the case be a strict loan, or be an irregular deposit, or be a *mutuum*, if there be an unreasonable delay in the repayment, our courts would generally, if not invariably, allow interest *ex morâ*. To this class of irregular deposits, or of *mutuum*, the common deposits in our bank properly belong.

§ 85. There is also another kind of deposit which may, for distinction's sake, be called a *quasi* deposit, which is governed by the same general rule as common deposits. It is where a party comes lawfully to the possession of another person's property by finding it. Under such circumstances, the finder seems bound to the same reasonable care of it, as any voluntary depositary *ex contractu*. St. German[5] says: "If a man finds goods of another, if they be after hurt or lost by wilful negligence, he shall be charged to the owner. But if they be lost by other casualty, as if they be laid in a house that by

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[1] Pothier, Traité de Dépôt, n. 82, 83; Durnford *v.* Segher's Syndics, 9 Martin, R. 484; Post, § 370 a.

[2] Pothier, Traité de Dépôt, n. 83.

[3] Dig. Lib. 16, tit. 3, l. 24; Pothier, Traité de Dépôt, n. 83.

[4] Pothier, Traité de Dépôt, n. 83.

[5] Doctor and Student, Dial. 2, ch. 38.

chance is burned, or if he deliver them to another to keep that runneth away with them, I think he be discharged."[1]

§ 85. In Bacon's Abridgment it is laid down, that, "If a man find goods and abuse them, or if he find sheep and kill them, this is a conversion. But if a man find butter, and by his negligent keeping it putrefy, or if a man find garments, and by negligent keeping they be moth-eaten, no action lies. So it is, if a man find goods, and lose them again."[2] And the reason of the difference is there stated to be this: "Where a man only finds the goods of another, the owner did not part with them under the caution of any trust or engagement; nor did the finder receive them into his possession under any obligation; and, therefore, the law only prohibits a man in this case from making an unjust profit of what is another's. But the finder is not obliged to preserve these goods safer than the owner himself did; for there is no reason for the law to lay such a duty on the finder in behalf of the careless owner. And it seems too rigorous to extend the charity of the finder beyond the diligence of the proprietor. It is, therefore, a good mean to punish an injurious act, namely, the conversion of the goods to his own use; but not to punish a negligence in him, when the owner is guilty of a much greater one."[3]

§ 86. The doctrine above laid down is very unsatisfactory.[4] Surely a thing may be lost without any negligence of the owner; and if the owner is negligent in losing it, it furnishes no very good reason why the finder should apologize for his own negligence by setting up that of the owner. If it were meant only to affirm that the finder is not liable for any thing but gross negligence, that would be intelligible. But the propo-

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[1] Doctor and Student, Dial. 2, ch. 38. See under what circumstances the finder of goods will be liable, upon a conversion thereof, to be treated as guilty of the crime of larceny or not. Merry *v.* Green, 7 Mees. and Welsb. 623, 631, 632; The People *v.* Cogdell, 1 Hill (N. Y.), R. 94; The People *v.* Anderson, 14 Johns. R. 294. [See also the subject fully discussed in Regina *v.* Thurborn, 2 Lead. Crim. Cases, and note.]

[2] 1 Bac. Abridg. *Bailment*, D.

[3] Ibid.

[4] See Mosgrave *v.* Agden, Owen, R. 141; 2 Ld. Raym. 909, per Gould, J.; Noy, Maxims, ch. 43, p. 92.

sition is not so limited in the text. On the contrary, it supposes that no degree of negligence would make him chargeable; which is directly against the doctrine laid down in the Doctor and Student in the passage above stated.[1] The only authorities relied on by the author of Bacon's Abridgment are certain cases in Owen's and Bulstrode's and Leonard's Reports. The citation from Bulstrode's Reports is a mere error. The case in Owen decides no more than that the finder of six barrels of butter was not liable in trover for a conversion, when the butter was impaired and decayed, *ratione negligentis custodiæ;* for the Court said, that he who finds goods is not bound to preserve them from putrefaction.[2] But if the goods were used, and by usage made worse, the action would lie. For aught appearing in the case, there may not have been any but ordinary, or even slight negligence. And there is a clear difference between the conversion of a thing, and negligence in keeping it. Trover lies only in the case of a conversion. The same case is reported in Cro. Eliz. 219, and in 1 Leon. Rep. 224. In the former report it is stated, that the case came on upon a demurrer to the declaration, the count alleging only that the finder *tam negligenter custodivit*, that the property became of little value. And the Court were of opinion that the action did not lie; for negligence was no conversion. Lord Chief Baron Comyns, in his Digest,[3] understands this to be the sole point of the case. The Court, however, is reported to have said: "No law compelleth him that finds a thing to keep it safely; as, if a man finds a garment and suffers it to be moth-eaten; or if one finds a horse and gives him no sustenance. But if a man finds a thing, and useth it, he is answerable, for it is a conversion," &c. "But for negligent keeping no law punisheth him." In 1 Leon. Rep. 224, the Court is reported to have said: "A man that comes to goods by trover is not bound to keep them so safely as he who comes to them by bailment." And Walmsley, J., said: "If a man find my

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[1] Doctor and Student, Dial. 2, ch. 38.

[2] Mosgrave *v.* Agden, Owen, 141.

[3] Com. Dig. *Trover*, E.

garments, and suffereth them to be eaten with moths by the negligent keeping of them, no action lieth; but if he weareth my garments it is otherwise, for the wearing is a conversion." The whole of this doctrine was clearly extrajudicial; for the only point before the Court was whether there was any conversion or not. Another case cited from Leonard's Reports[1] turned on a point of pleading; and Mr. Justice Anderson there said, *arguendo:* "When a man comes to goods by trover, there is not any doubt but by law he hath liberty to take possession of them. But he cannot abuse them, kill them, or convert them to his own use, or make any profit of them; and if he do, it is great reason that he be answerable for the same. But if he lose such goods afterwards, or they be taken from him, then he shall not be charged; for he is not bound to keep them." This is the only *dictum* in the case bearing on the doctrine; and it may be correct, when understood with the natural limitations belonging to it, namely, that the finder has not been guilty of gross negligence. But if the learned Judge meant to say, that, if the goods are lost by the gross negligence of the finder, he is not answerable for the loss, such a doctrine would require some authority beyond a mere incidental *dictum* to support it.

§ 87. At the time when these opinions were promulgated, the law of bailments was not as well defined as it is at present; and, therefore, they would be entitled to less weight than is usually given to judicial determinations, even if they stood without any contradiction. But at a later period we have an elaborate judgment of Lord Coke directly against the doctrine. In Isaac *v.* Clarke,[2] that great Judge deliberately declared, that, "If a man finds goods, an action on the case lies for his ill and negligent keeping of them, but not trover or conversion, because this is but a nonfeasance." This seems the true doctrine of the law; for, although a finder may not be compellable to take goods which he finds, as it is a mere deed of charity for the owner; yet, when he does undertake the custody, he ought

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[1] Vandrink *v.* Archer, 1 Leon. R. 221.

[2] 2 Bulst. 306, 312; s. c. 1 Roll. R. 126, 130. See Smith *v.* The Nashua & Lowell Railroad, 7 Foster, 91.

to exercise reasonable diligence in preserving the goods. And the least degree of care known to our law, that is, slight diligence, may well be required of him, being that which is applied to gratuitous acts of kindness. This is conformable to the rule laid down, as has been already seen, in the Doctor and Student,[1] and it seems incidentally recognized in other authorities.[2] So that there seems no just foundation in our law for any distinction as to responsibility, although there may be as to remedy, between cases of conversion and misfeasance by the finder of goods, and cases of negligence, if the loss has arisen from that degree of negligence for which gratuitous bailees would ordinarily be liable.

§ 88. In the ordinary cases of deposits of money with banking corporations, or bankers, the transaction amounts to a mere loan or *mutuum*, or irregular deposit, and the bank is to restore not the same money, but an equivalent sum, whenever it is demanded.[3] But persons are sometimes in the habit of making what is called a special deposit of money or bills in a bank, where the specific money, the very silver or gold coin, or bills deposited, are to be restored, and not an equivalent. In this last case the transaction is a genuine deposit; and the banking company has no authority to use the money so deposited, but is bound to return it *in individuo* to the party. A case of great interest has been recently decided upon this subject. A special deposit of gold coin was made in a bank, and the money was placed in the vault of the corporation, under the care of the cashier of the bank, who also had the custody of the money of the corporation in the same vault, and kept the keys thereof. He was unfaithful in the discharge of his duty and embezzled the special deposit, as well as other property belonging to the bank. The Court before which the cause was heard, in a very elaborate judgment, decided, that in such a case the banking corporation was liable only for gross negligence; that the

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[1] Dial. 2, ch. 38; Ante, § 85.

[2] S. P. Gould, J., in Coggs *v.* Bernard, 2 Ld. Raym. 909. See 2 Ld. Raym. 917; Noy, Maxims, ch. 43, p. 92.

[3] Pothier, Prêt de Consumption, n. 1, 4, 13; Ante, § 85; Keene *v.* Collier, 1 Met. (Ky.), 417.

receipt of the deposit by the cashier must be deemed obligatory upon the corporation; but that the corporation was not liable in this case, because there was no gross negligence on its part; for the same care was taken of this as of other deposits, and of the property belonging to the corporation. The fraud and embezzlement, being by the cashier, did not, under such circumstances, vary the case. The responsibility of the bank was the same as if the theft had been committed by a stranger; for there was no want of diligence on its own part in selecting proper officers, and the act of embezzlement was not within the scope of the duty of the cashier, as agent of the corporation. If goods deposited are stolen by the servants of a private depositary, without gross negligence on his own part, he is not chargeable, any more than he would be if the theft were by a stranger; and the same rule must be applied to banking corporations.[1] In this case, the cashier had given a written acknowledgment, that the gold was deposited for "safe keeping;" but this was not thought to vary the application of the general rule, as the writing imported no more than was ordinarily implied in all such cases; and a special contract was not within the scope of the authority of the cashier.[2]

§ 89. In respect to the mode of keeping the deposit, and the authority of the depositary over it, a question often arises, how far the depositary is at liberty to use the thing deposited. In general it may be laid down that the depositary has no right to use the thing deposited, unless there be an express or implied consent on the part of the depositor. This is the clear result of the Roman law,[3] and the French law, and the law of Louisiana,[4] and it has been incorporated into ours.[5] But this proposition must be received with some qualifications. There

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[1] Foster *v.* Essex Bank, 17 Mass. R. 479. See also, Finucane *v.* Small, 1 Esp. R. 315; Butt *v.* Great Western Railway Co. 7 Eng. Law & Eq. R. 448.

[2] Ibid. 17 Mass. R. 505. See also, Whitney *v.* Lee, 8 Metcalf, R. 91.

[3] Dig. Lib. 16, tit. 3, l. 29; Cod. Lib. 4, tit. 34, l. 3; 1 Domat, B. 1, tit. 7, § 3, n. 13; Ayliffe, Pand. B. 4, tit. 17, p. 519; Pothier, Traité de Dépôt, n. 34.

[4] Pothier, Traité de Dépôt, n. 34 to 37; Code Civil of France, art. 1930; Code of Louisiana (1825), art. 2911, 2913.

[5] Bac. Abridg. *Bailment*, D.; Jones on Bailm. 81, 82; 1 Dane, Abridg. ch. 17, art. 1, § 2.

are certain cases in which the use of the thing may be necessary for the due preservation of the deposit. There are others, again, where it would be mischievous; and others, again, where it would be, if not positively beneficial, at least indifferent. If a bailment were made of a horse, the depositary would certainly be at liberty to use him, so far, at least, as to preserve his health; and if he should die from gross negligence in this particular, the depositary might be chargeable with the loss; for every person, in such a case, contracts for reasonable care.[1] If a milch cow were deposited, the milking of the cow, to say the least of it, would not subject the depositary to an action, for it would not injure, but might promote the health of the animal.[2] The Roman and the French law, in such a case, would justify the act; but would require the depositary to account for the value of the milk, deducting the reasonable charges for her nourishment.[3] On the other hand, if diamonds and jewels were deposited, it might be deemed an abuse of the trust to wear them, or to suffer them to be worn by the family of the depositary, even although the use might be of no injury; for it would subject the deposit to undue perils and chances of loss.[4]

§ 90. The best general rule on the subject (for every case must be governed by its own particular circumstances), is to consider, whether there may or may not be an implied consent on the part of the owner to the use. If the use would be for the benefit of the deposit, the assent of the owner may well be presumed; if to his injury, or perilous, it ought not to be presumed; if the use would be indifferent, and other circumstances do not incline either way, the use may be deemed not allowable.[5] If money is deposited, especially if locked up in a

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[1] Jones on Bailm. 81, 82.

[2] Ibid.; Mores *v.* Conham, Owen, R. 123, 124; Anon. 2 Salk. 522; 2 Kent, Comm. Lect. 40, p. 568, 578, 579.

[3] Pothier, Traité de Dépôt, n. 47; Dig. Lib. 16, tit. 3, l. 29, § 1; Jones on Bailm. 81, 82; Pothier, Nantissement, n. 35; Code Civil of France, art. 1936; Code of Louisiana (1825), art. 2919.

[4] Jones on Bailm. 81, 82.

[5] Jones on Bailm. 80, 81; Ante, § 89; Code of Louisiana (1825), art. 2913.

chest, or inclosed in a bag, the right to use it could scarcely be presumed to have been within the intention of the parties.[1] The same rule would apply to other valuables, such as jewelry; for they would be subject to extraordinary perils.[2] If books are lodged in a trunk, and locked up, the use of them would seem to be impliedly prohibited, especially if the key is kept by the bailor. But if the books are in an open chest, or open bookcase, or are left generally accessible, Pothier supposes that a consent to the use of them by the depositary may be fairly presumed.[3] But if this be true, still a right to lend them to other persons ought not to be presumed. And if the books are very valuable, and have very expensive plates in them, which would be injured by use, a consent to use them ought scarcely to be presumed. A deposit of valuable paintings would not justify a general use of them for purposes of show, or parade, which would expose them to injury; but a modified use of them might be fairly presumed, as an ornament of a private room, if they were left open in their frames. A deposit of a library of law books in the library of a friend, who is a lawyer, would almost carry with it the implication of a right on his part to use them for private consultation. Many other cases might be put to show the application of the principle of presumption.[4] Pothier puts one case of the deposit of a setting dog, where the use might fairly be presumed for shooting game;[5] and the same may apply to hounds for the chase.[6] The French code expresses the true sense of the law on this subject. The depositary cannot make use of the thing deposited without the express or presumed permission of the depositor.[7]

§ 91. The Roman law treated the use of the thing deposited

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[1] Pothier, Traité de Dépôt, n. 37; Code of Louisiana (1825), art. 2914.

[2] Ante, § 89.

[3] Pothier, Traité de Dépôt, n. 37.

[4] Ayliffe, Pand. B. 4, tit. 17; Jones on Bailm. 79, 80, 81.

[5] Pothier, Traité de Dépôt, n. 37; Jones on Bailm. 80, 81.

[6] Jones on Bailm. 79, 80, 81.

[7] Code Civil of France, B. 3, tit. 11, art. 1930; Code of Louisiana (1825), art. 2911.

without any express or implied consent of the owner, as being a gross breach of trust, and involving the criminality of theft, according to the definition of that offence in that law, which is more comprehensive than ours. *Si quidem, qui rem depositam, invito domino, sciens prudensque in usus suos converterit, etiam furti delicto succedit.*[1] Our law deems it a mere breach of private confidence, unless in very special cases, which demonstrate a felonious intent, or, as it is technically called, *animus furandi.*[2]

§ 92. It follows, from what has been said, that it is a gross breach of trust, which gives to the injured party a just cause of action, for a bailee to break open a locked chest, or a sealed package, which is deposited with him.[3] A *fortiori*, the depositary has no authority to sell or pledge the deposit; and if he does, the owner may reclaim it from any person who is found in possession of it.[4] The Roman law also gave a right of action to a testator, who trusted another with his will to be kept for him, if he discovered the contents of it to any other persons.[5] Our law does not, as far as I know, provide any redress in such a case; unless, at least, some positive injury results from it. But it is as aggravated a breach of trust as can well be conceived, and may often be attended with serious mischiefs. The French law has followed the reasonable doctrine of the civil law;[6] one cannot but wish that the common law had animadverted on it in some form, either of civil or of criminal

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[1] Cod. Lib. 4, tit. 34, l. 3; Dig. Lib. 16, tit. 3, l. 29.

[2] In Herman *v.* Drinkwater, 1 Greenl. R. 27, where a shipmaster, having received a trunk of goods on board his vessel to be carried to another port, on the passage broke open the trunk, and rifled it of its contents; the owner, having proved the delivery of the trunk, and the breaking open by the master by other evidence, was permitted, in the absence of all other evidence, to establish the particular contents of the trunk by his own testimony on oath, *in odium spoliatoris.* See Pothier, Traité de Dépôt, n. 42; 1 Greenleaf, Evidence, § 348; Oppenheimer *v.* Edney, 9 Humphreys, R. 385.

[3] Code of Louisiana (1825), art. 2914.

[4] Hartop *v.* Hoare, 3 Atk. 44; s. c. 1 Wils. 8, 9; 2 Str. 1187.

[5] Dig. Lib. 16, tit. 3, l. 1, § 38; Pothier, Traité de Dépôt, n. 39.

[6] Pothier, Traité de Dépôt, n. 38, 39; Code Civil of France, art. 1931; Code of Louisiana (1825), art. 2914.

prosecution, which should add a legal sanction to what now seems a mere moral sanction upon the conscience of the depositary of a will.

§ 93. It is often laid down in our books, that a depositary has a special property in the deposit. There is no doubt, that, in certain kinds of bailment, the bailee has a special property; but that he possesses it in the case of a mere deposit is a matter of serious doubt. Mr. Justice Blackstone, in his Commentaries,[1] lays down the doctrine as follows: "In all these instances (i. e. in all classes of bailment), there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property, because of his contract for restitution; the bailor having still left in him the right to a chose in action, grounded upon such contract. And on account of this qualified property of the bailee, he may, as well as the bailor, maintain an action against such as injure or take away the chattels. The tailor, the carrier, the innkeeper, the agisting farmer, the pawnbroker, the distrainor, and the general bailee, may all of them vindicate, in their own right, this their possessory interest, against any stranger or third person." The phrase "possessory interest" does in truth express exactly the right of a general bailee, and especially of a depositary, that is, it is a right of possession against every person but the true owner. But as to the other bailees above stated, they have not only a right of possession against third persons, but also against the owner himself; and some of them, as, for example, a pawnbroker, have not only a possessory interest, but a special property in the pawn. For the full extent of his proposition, Mr. Justice Blackstone mainly relies on Heydon and Smith's case,[2] which certainly does not support it.[3] Sir William Jones

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[1] 2 Black. Comm. 452.

[2] 13 Rep. 67, 69.

[3] The case was an action of trespass for cutting down a timber tree. There was a justification pleaded, that it was done by command of the owner, A. The replication asserted a title in the plaintiff as a copyholder, and a custom to cut down wood in the manor for housebote, &c., and that the plaintiff cut down the tree for repairs. There were several points argued. And among other things, it was said: "That he who hath a special property of the goods at a certain

also lays down the doctrine in equally general terms. "For," says he, "every bailee has a temporary qualified property in the things of which possession is delivered to him; and has, therefore, a possessory action, or an appeal in his own name, against a stranger who may damage or purloin them."[1] And he immediately adds: "With us the general bailee has unquestionably a limited property in the goods intrusted to his care."[2] And for this he relies on a case in the Year Book,[3] which, it must be admitted, seems full to the point. It was an action of replevin. The defendant pleaded property in a stranger; the plaintiff replied, that the stranger had bailed the goods to him to redeliver them to the stranger, and before the redelivery the defendant took them. There was a demurrer to the replication, which was argued. Mr. Justice Fineux there said: "In this case, the bailee has a property in the thing against every stranger; for he is chargeable to the bailor, and for this reason he shall recover against a stranger, who takes the goods out of his possession." And judgment was accordingly given for the plaintiff. Now, an action of replevin will lie only where the party hath a general or a special property in the thing.[4] There can be no doubt, that if the bailee in that case, was a pawnee or a factor, he might maintain the action. What sort of bailee he was does not positively appear in the report; although it may fairly be inferred, from the language of the replication, that he was a mere depositary. There are other cases, which hint at the same doctrine as that in the Year Book.[5]

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time shall have a general action of trespass against him who hath the general property, and upon the evidence damages shall be mitigated. But clearly the bailee, or he who hath a special property, shall have a general action of trespass against a stranger, and shall recover all in damages, because that he is chargeable over." And for this is cited 21 Hen. 7, 14 b. It is then added: "If a man bails goods, which are taken out of his possession, if the bailee recover in trespass, the same shall be a good bar to the bailor." For this is cited, 5 Hen. 4, 2, which is a mis-citation, for there is nothing there to the point.

[1] Jones on Bailm. 80.

[2] Ibid.

[3] 21 Hen. 7, 14 b.

[4] Co. Litt. 145 b; Com. Dig. *Replevin*, B.

[5] Rich *v.* Aldred, 6 Mod. R. 216; 2 Ld. Raym. 912, per Powell, J.; 2 Saund.

§ 93 *a*. There are other cases, which certainly inculcate a different doctrine, and in which it has been held that a mere depositary has no special property whatever in the deposit, but a custody only. There is a clear known distinction between the custody of a thing and the property, whether general or special, in a thing.[1] If a depositary has a special property in the deposit, it must be equally true, that every other bailee has, and, indeed, that every person, who lawfully has the custody of a thing, with the assent of the owner, has a special property in it during the time of his custody. Under such circumstances, the distinction between a special property and a mere custody would seem to be almost, if not entirely, evanescent. The point came directly before the Court in the case of Hartop *v.* Hoare.[2] In that case, certain jewels, inclosed in a sealed paper and sealed bag, had been placed by Hartop (the owner), in the hands of a jeweller, for safe custody, and the latter afterwards broke the seal, took out the jewels, and pledged them to the defendant for an advance of money. The owner afterwards brought an action of trover against the defendant, who refused to deliver up the jewels without payment of the advance. And the question was made, whether the plaintiff was entitled to recover under those circumstances. The points made and considered were, first, in what relation the jeweller stood to the plaintiff; and, secondly, how far the plaintiff was bound by the jeweller's acts in pawning them. The Court, upon solemn deliberation, held, first, that the delivery of the jewels to the jeweller was a mere naked bailment of them for the use of the bailor, and that the jeweller was a mere depositary, having no general or special property in the jewels, and no right to sell or dispose thereof, but having the custody only;

R. 47 b, note; Holliday *v.* Camsell, 1 Term Rep. 658; 2 Black. Comm. 451, 452, 453; Arnold *v.* Jefferson, 1 Ld. Raym. 275. See also, Mr. Wallace's remarks on this point, in the American Jurist for January, 1837, 16 American Jurist, p. 280 to 285.

[1] Holliday *v.* Camsell, 1 Term Rep. 658, 659, per Buller, J.; Bac. Abridg. *Bailment*, A. C.; 1 Dane, Abridg. ch. 17, art. 8, § 9.

[2] 3 Atk. R. 44; s. c. 1 Wilson, R. 8; 2 Str. R. 1187. But the report in 3 Atk. 44 is the fullest and best.

and, secondly, that the pledge by the jeweller was wrongful, and the refusal by the defendant was a tortious conversion of the property for which the action of trover lay. A similar distinction seems to have been taken in Southcote's case;[1] and it was also stated by Mr. Justice Buller, in Holliday *v.* Camsell.[2] It is also manifest from the judgment of Lord Coke, in the case of Isaac *v.* Clarke,[3] that he held the opinion, that every bailment did not import a special property in the bailee. His language was: "Bailment makes a privity. If one has goods as a bailee, where he hath only a possession, and no property, yet he shall have an action for them." Unless the doctrine here stated, and especially that which was solemnly adjudged in Hartop *v.* Hoare, is to be overturned, it cannot be maintained, upon the footing of authority, that a mere depositary has a special property in the deposit, or any thing more than a mere rightful possession and custody.

§ 93 *b*. The very question arose in Waterman *v.* Robinson,[4] and it was the only point in judgment. In that case, which was an action of replevin, a commission of bankruptcy issued against the owner of the goods, and the goods were seized by the messenger under the commission, and delivered by him to the plaintiff, taking his obligation to keep them safely, and to redeliver them on demand. An assignee was duly appointed, and all the bankrupt's property assigned; and the defendant, who was a deputy sheriff, afterwards attached the goods on a writ against the bankrupt. The Court held, that the plaintiff was a mere bailee for safe keeping, and had no general or special property in the goods, and, therefore, was incompetent to maintain an action of replevin therefor, although he might, if his possession was violated, have maintained an action of trespass or trover.[5]

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[1] 4 Co. Rep. 83.

[2] 1 Term Rep. 658, 659.

[3] 2 Bulst. Rep. 306, 311.

[4] 5 Mass. R. 303, 304; Post, § 125.

[5] Mr. Chief Justice Parsons, in delivering the opinion of the Court in this case, said: "Upon these facts we are to decide, whether the property of the goods, so that he might lawfully replevy them, was in the plaintiff. Trover

§ 93 *c*. It is sometimes supposed, that, because a depositary is entitled to maintain an action against a wrongdoer, who disturbs his possession, or injures, or takes away, or converts, the deposit, therefore he has a special property in the deposit; and, especially, it is supposed that the depositary has such a special property, because, in such cases, he may maintain an action of trover, as well as of trespass, against the wrongdoer; because trover is an action exclusively founded in a right of property. It is, indeed, often stated in the authorities, that trespass is an action founded on possession, and trover on property; and that, in order to maintain trover, it is necessary that the plaintiff should have either an absolute or a special property in the goods which are the subject of the action.[1] But this language is generally used merely to present the leading

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may be maintained by him who has the possession: but replevin cannot be maintained but by him who has the property, either general or special. Admitting the commission, and the proceedings under it to be regular, what property had the plaintiff in the goods? The general property was in the commissioners until the assignment, and then in the assignee. The messenger, if any person, had the special property, and not the plaintiff, who had no interest in the goods, but merely had the care of them for safe keeping. If his possession was violated, he might maintain trespass or trover, but he had no special property, by which he could maintain replevin; in which the question is not of possession, but of property, although possession may be primâ facie evidence of property. On this ground, we are of opinion that the plaintiff cannot maintain this action, he not proving that either the general or special property was in himself." See also, Ludden *v.* Leavitt, 9 Mass. R. 104; Warren *v.* Leland, 9 Mass. R. 265; Commonwealth *v.* Morse, 14 Mass. R. 217; all of which are directly to the point, that a bailee for safe keeping has no special property but a mere custody. See also, Brownell *v.* Manchester, 1 Pick. 232. It has sometimes been supposed, that there was a distinction between the case of the possession of a bailee and the possession of a servant; and that, where a sheriff attaches property, and delivers it to a person to keep for him, and to redeliver it to him, the latter is not a bailee, but a servant of the sheriff. See 16 American Jurist, 1837, p. 284. But this is a very incorrect view of the matter. A bailee is often called the servant of the bailor. Mr. Justice Buller, in Ward *v.* Macauley, 4 Term Rep. 489, 490, said: "The carrier is considered, in law, as the servant of the owner, and the possession of the servant is the possession of the master." And yet, the carrier has a special property in the thing bailed.

[1] Pyne *v.* Dorr, 1 Term Rep. 55, 56; Webb *v.* Fox, 7 Term Rep. 398, per Lawrence, J.; 2 Saund. Rep. 47 a, Williams's note; Ward *v.* Macauley, 4 Term Rep. 489, 490; White *v.* Webb, 15 Conn. R. 302.

distinction between the action of trespass and that of trover; in the former, possession is indispensable to maintain the suit; in the latter, property is sufficient, if there is a right of possession; for the right of property generally draws to it the possession.[1] But unless the party has the right of possession, as well as the right of property, he cannot maintain trover.[2]

§ 93 *d*. The language also used in some of the authorities, as to special property, has certainly no small tendency to mislead us; for the phrase is often used in a loose and general sense, as merely equivalent to a right or title to hold the possession against all persons except the true owner, and even against him for a particular purpose, without intending that the bailee has any interest whatever in the thing, that is, any *jus in re*.[3] Perhaps, in an accurate sense, it might be more proper to say, that the mere lawful possession of a chattel, whether accompanied with a special interest or property in it or not, is sufficient for the possessor to maintain an action of trover, as well as of trespass, against any wrongdoer who violates that possession.[4] Thus, it has been held, that the finder of a jewel, although he does not by such finding acquire any absolute property, yet has such a property (title) as will enable him to keep it against all persons but the rightful owner, and he may maintain trover for it.[5] There are many other cases, in which it has been held (as we shall presently see), that trover will lie in favor of a bailee, where the bailment is not made for any special purpose, but only for the benefit of the

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[1] See 2 Saund. Rep. 47 a, Williams's note.

[2] Gordon *v.* Harper, 7 Term Rep. 10, 12; Pain *v.* Whittaker, Ryan & Mood. R. 99; 2 Saund. R. 47 c, Williams's note; Smith *v.* Milles, 1 Term Rep. 480; Bac. Abridg. *Trespass*, C.

[3] See Giles *v.* Grover, 6 Bligh, R. 277, 291, 292, 316, 318, 319, 321, 322, 334, 335, 339 to 342, 371, 372, 405, 433, 434, 436, 437.

[4] Waterman *v.* Robinson, 5 Mass. R. 303, 304; Giles *v.* Grover, 6 Bligh, R. 271, 436, 452, 453.

[5] Armory *v.* Delamirie, 1 Str. R. 505; 2 Saund. R. 47 d, Williams's note; Clark *v.* Maloney, 3 Harringt. 68; Sutton *v.* Buck, 2 Taunt. R. 302, 309; Webb *v.* Fox, 7 Term Rep. 391, 399; 1 Dane, Abridg. ch. 17, art. 8, 9; Godbolt, R. 160, pl. 224; Burton *v.* Hughes, 2 Bing. R. 175, by Best, Ch. Just., and Park, J.

rightful owner.[1] [Thus, a receiptor to whom a sheriff has intrusted for safe keeping, property attached by him on a writ against a third person, may maintain trover against a wrongdoer who takes the property from his possession without color of right.[2]]

§ 93 *e*. In a very recent case, in the House of Lords,[3] where the subject was much discussed, in consequence of a final difference of opinion among the Judges, the point was strenuously pressed, that, after a seizure of goods in execution by the sheriff, the property is devested out of the debtor, and a special property is vested in the sheriff; and one argument to establish this special property was, that, if the goods after such execution, and before the sale, are taken out of the possession of the sheriff, he may maintain trover therefor against the wrongdoer. Upon that occasion Lord Tenterden said:[4] "It

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[1] Sutton *v.* Buck, 2 Taunt. R. 302, 309, per Chambre, J.; Roberts *v.* Wyatt, 2 Taunt. R. 268, 278; Nicolls *v.* Bastard, 2 Cromp. Mees. & Rosc. 659; s. c. 1 Tyr. & Gr. 156. In Sutton *v.* Buck (2 Taunt. R. 302), it was expressly held, that possession of chattels was sufficient to maintain an action of trover against a mere wrongdoer. In that case, Lawrence, J., said: "There is enough property in this plaintiff to maintain trover against a wrongdoer. As far as regards the possession (of the plaintiff), it is good against all, except the vendor himself. There is a difference made in the books between a wrongdoer and one acting under color of a title. In the case of Armory *v.* Delamirie, 1 Str. 505, the bare possession was held sufficient to recover (in trover), against a wrongdoer." Chambre, J., said: "Here the plaintiff has possession under the rightful owner, and that is sufficient against a person having no color of title." These remarks were quoted and approved of by the Court in Burton *v.* Hughes (2 Bing. R. 275), where Lord Ch. Just. Best said: "The case, which has been referred to (2 Taunt. R. 302), confirms what I had esteemed to be the law upon the subject, namely, that a simple bailee has a sufficient interest to sue in trover." Park, J., said: "Admitting that the defendants were not wrongdoers, at all events they were strangers, and possession is sufficient to enable a party to maintain trover against a stranger." And he then quoted the language of Chambre, J., above cited, with approbation. Oughton *v.* Seppings, 1 Barn. & Adolph. R. 241, is to the same effect, that mere possession is a sufficient title against a wrongdoer. See also, 2 Saund. Rep. 47 c; Id. 47 d, Williams's note; Webb *v.* Fox, 7 Term Rep. 391; Ante, § 93 b, and note. Moran *v.* Portland Steam Packet Co. 35 Maine, 55. Hyde *v.* Noble, 23 N. H. R. 494.

[2] Thayer *v.* Hutchinson, 13 Vermont, 504.

[3] Giles *v.* Grover, 6 Bligh, R. 277.

[4] Giles *v.* Grover, 6 Bligh, R. 452, 453.

has been argued that the property is vested in the sheriff, because there are authorities to show that the sheriff, if the property is taken out of his hands, may maintain an action of trover against the wrongdoer. These actions are maintainable upon a ground perfectly distinct from the right of property. They are maintainable upon the ground of possession. Any man in possession of goods, either as the bailee or otherwise, may, in his own name, maintain an action. The power, therefore, of bringing an action of this kind, does by no means prove that the property is in the sheriff." Upon the same occasion Lord Chief Justice Tindal said: "It has been further contended, that, as the sheriff may maintain an action of trespass or trover against any wrongdoer for taking goods which he has seized, it therefore follows that he, and not the defendant, has the property in the goods so seized. But to this argument it appears sufficient to answer, that any person who has the legal possession of goods, though not the property, may maintain this action against a wrongdoer; for a mere wrongdoer cannot dispute the title of the party who is in the possession of the goods, without any color of legal title."[1] The same doctrine,

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[1] The whole passage deserves to be quoted at large; because, although his Lordship uses the words "special property" in the sheriff, he afterwards explains his meaning to be, to use them in a very qualified sense, excluding every notion of interest. "It has further been contended, that, as the sheriff may maintain an action of trespass or trover against any wrongdoer for taking goods which he has seized, it therefore follows that he, and not the defendant, has the property in the goods so seized. But to this argument it appears sufficient to answer, that any person who has the legal possession of goods, though not the property, may maintain this action against a wrongdoer; for a mere wrongdoer cannot dispute the title of the party who is in the possession of the goods, without any color of legal title. The sheriff, no doubt, has the legal custody and possession of the goods after seizure; he has a special property in him for that purpose, for the law has directed him to seize and make sale thereof. But this affords no argument that the absolute property in the goods is altered and devested from the defendant; for the very same action is maintainable by the finder of goods against the person who wrongfully takes them from him, or by the carrier of goods for hire, or by the bailee of goods against a trespasser; and yet, in the three cases last put, the absolute property is not devested from, but still remains in, the true owner." Again he says: "It would be a better definition of the sheriff's relation to these goods, to say he has them in his cus-

that a bailee upon a simple bailment may maintain either trespass or trover, founded upon his mere possession, has been recognized in other still more recent cases.[1] On a very late occasion, Mr. Justice Patterson said: "My brother Ludlow contends, that a person who has a right of custody of a chattel may bring trover to obtain the chattel. So he may, after he has once obtained the custody. But this is an action of trover to obtain custody."[2] Mr. Justice Coleridge, in the same case, added: "When a plaintiff in trover has no possession, he must have a general or special property;"[3] thus, admitting that possession alone, without property, is sufficient to maintain the action.[4] The circumstance, therefore, that trover may be maintained by a simple depositary against a wrongdoer, does not seem decisive that he has a special property in the deposit.[5]

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tody under a power to sell them, rather than any actual interest or property in them. His situation, indeed, cannot be better defined than by saying the goods are in custodiâ legis, a phrase which plainly distinguishes a mere custody and guardianship of the goods from a change in the property. So far, therefore, as a special property in the goods is necessary for their safe custody against wrongdoers, and to render the execution of his public duty useful to the judgment creditor, so far he may be said to have the property; but beyond this, and as against the rights of adverse claimants, there is no authority for saying that he has any property at all." p. 436. Mr. Justice Patterson, Mr. Baron Alderson, and Mr. Baron Vaughan, gave the same explanation; 6 Bligh, R. 291, 292; Id. 316 to 322; Id. 371, 372. Mr. Justice Taunton (p. 335) said: "The sheriff, under the writ, has a mere power to sell, without any interest vested in him, except that which any bailee, such as a carrier, wharfinger, &c., who is answerable over, has for his own protection. This interest, if so it may be termed, is called a special property, as contradistinguished from a general property, and in respect to this we know he may bring trover for the goods seized. But it is not a beneficial interest." See Id. p. 340, 341. The House of Lords adopted this doctrine by affirming the judgment. See also, Pothier, Traité de Dépôt, n. 93.

[1] Nicolls *v.* Bastard, 2 Cromp. Mees. and Rosc. 659, 660, 661. See also, Moore *v.* Robinson, 2 Barn. & Adolph. 817; Pitts *v.* Gaince, 1 Salk. 10.

[2] Addison *v.* Round, 4 Ad. & Ellis, R. 799, 804.

[3] Id. 804.

[4] See 2 Kent, Comm. Lect. 40, p. 568, 585, 4th edit.; Webb *v.* Fox, 7 Term Rep. 390, 391.

[5] Post, § 150, 279, 280. The case of Rooth *v.* Wilson (1 Barn. & Ald. 59), and the case of Miles *v.* Cattle (6 Bing. R. 743; s. c. 4 Moore & P. R. 630), do not, properly considered, inculcate a different doctrine. The former was an action on the case against the defendant, for negligence in not repairing

§ 93*f*. The true doctrine would seem to be, that every bailee ought to have a general right of action against mere wrongdoers to the property, while in his possession, whether he has a special property therein or not, because he is answerable over to the bailor; for (as has been well said) a man ought not to be charged with an injury to another, without being able to resort to the original cause of that injury, and in amends there to do himself right.[1] And accordingly this rule is laid down in Bacon's Abridgment; and it is supported by the other authorities already cited.[2]

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the fences of his close, by which non-repair a certain horse, of which the plaintiff was a gratuitous bailee, which was put by him in his adjoining close, fell into the defendant's close and was killed. The Court held, that the plaintiff was entitled to recover. Lord Ellenborough said, that the plaintiff's putting the horse into his field, under such circumstances, was such a degree of negligence as rendered him liable to the owner, and this liability was sufficient to enable him to maintain the action. He had an interest in the integrity and safety of the animal, and might sue for damages done to that interest. Mr. Justice Bayley was of the same opinion, and said that case was a possessory action. Mr. Justice Abbot said, that the same possession which would enable the plaintiff to maintain trespass, would enable the plaintiff to maintain this action. Mr. Justice Holroyd said, that the negligence of the defendant had deprived the plaintiff, in some degree, of the means of exercising his right for the purpose of putting the cattle of others into his field, as well as his own; and if damage accrued to either, he was entitled to maintain the action. Nothing was said as to the plaintiff having a special property in the horse. In the other case (Miles *v.* Cattle), the action was a case for negligence against a carrier. The plaintiff had received a parcel from A, to book for London, at the office of the defendant. Instead of doing so, the plaintiff being about to go to London in the defendant's coach, put the parcel in his own bag, containing his clothes, which was lost on the journey. The plaintiff had a verdict for the value of his own clothes; but the Court held that he was not entitled to any thing for the loss of the parcel intrusted to him, because at the time he had no absolute or special property in the parcel, as the bailment had terminated by his own misfeasance. Whether this case was correctly decided, and whether it is reconcilable with that in 1 Barn. & Ald. 59, or not, needs not be discussed on the present occasion. It is sufficient that it turned on a point not now under consideration. Post, § 152.

[1] Bac. Abridg. *Bailment*, D. See Steamboat Co. *v.* Atkins, 10 Harris, 522.

[2] Bac. Abridg. *Bailment*, D.; 1 Dane, Abridg. ch. 17, art. 8, 9; Rooth *v.* Wilson, 1 Barn. & Ald. 59; Heydon and Smith's case, 13 Co. R. 69; 21 Hen. 7, 14 b; Roberts *v.* Wyatt, 2 Taunt. R. 268, 275; Sutton *v.* Buck, 2 Taunt. R. 302; Hartop *v.* Hoare, 3 Atk. 44; s. c. 1 Wilson R. 8; Burton *v.* Hughes, 2

§ 93 *g*. After all, the point, in the present state of the law, may, perhaps, depend more upon the definition of terms, than upon any real controversy as to principle. What is meant by a special property in a thing? Does it mean a qualified right or interest in the thing, a *jus in re*, or a right annexed to the thing? Or does it mean merely a lawful right of custody or possession of the thing, which constitutes a sufficient title to maintain that possession against wrongdoers by action or otherwise? If the latter be its true signification, it is little more than a dispute about terms; as all persons will now admit that every bailee, even under a naked bailment from the owner, and every rightful possessor by act or operation of law, has in this sense a special property in the thing. But this certainty is not the sense in which the phrase is ordinarily understood. When we speak of a person's having a property in a thing, we mean that he has some fixed interest in it (*jus in re*), or some fixed right attached to it, either equitable or legal; and when we speak of a special property in a thing, we mean some special fixed interest or right therein, distinct from and subordinate to the absolute property or interest of the general owner. Thus, for example, if goods are pledged for a debt, we say that the pledgee has a special property therein; for he has a qualified interest in the thing, coextensive with his debt, as owner *pro tanto*. So we say that artificers and workmen, who work on or repair a chattel, and warehousemen, and wharfingers, and factors, and carriers, have a special property in the chattel confided to them for hire, for the particular purpose of their vocation, because they have a lien thereon for the amount of the hire due to them, and a rightful possession in virtue of that lien, even against the general owner, which he cannot displace without discharging the lien.[1] So the sheriff, who has lawfully seized goods on an execution, may in this sense be said, without, perhaps, straining the propriety of language, to have a

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Bing. R. 173; Post, § 133; Addison *v.* Round, 4 Adolph. & Ellis, 799, 804; Nicolls *v.* Bastard, 2 Cromp. Mees. & Rosc. 659, 660; Waterman *v.* Robinson, 5 Mass. R. 303, 304; Ante, § 93 to 93 d. See also, 2 Kent, Comm. Lect. 40, p. 567, 585, 4th edit.

[1] Bac. Abridg. *Bailment*, C.

special property in the goods, although more correctly speaking, the goods should be deemed to be in the custody of the law, and his possession a lawful possession, binding the property for the purposes of the execution against the general owner, as well as against wrongdoers.[1] But it seems a confusion of all distinctions to say, that a naked bailee, such as a depositary, has a special property, when he has no more than a lawful custody or possession of the thing, without any vested interest therein for which he can detain the property, even for a moment, against the lawful owner. It might, with far more propriety, be stated that a gratuitous borrower has a special property in the thing bailed to him, because, during the time of the bailment, he has a right to the use of the thing, and seems thus clothed with a temporary ownership for the purposes of the loan.[2] Yet this has sometimes been a matter denied or doubted.[3]

§ 93 *h*. Mr. Justice Blackstone has defined an absolute property to be, "Where a man has solely and exclusively the right, and also the occupation, of any movable chattels, so that they cannot be transferred from him, or cease to be his, without his own act or default;"[4] and qualified, limited, or special property to be such "as is not in its nature permanent, but may sometimes subsist, and at other times not subsist."[5] And, after illustrating this doctrine by cases of qualified property in animals *feræ naturæ*, and in the elements of fire, light, air, and water, he then proceeds: "These kinds of qualification in property depend upon the peculiar circumstances of the subject-matter, which is not capable of being under the absolute dominion of any proprietor. But the property may also be of a qualified or special nature, on account of the peculiar circumstances of the owner, when the thing itself is very capable of absolute ownership. As in case of bailment, or delivery of

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[1] Giles *v.* Grover, 6 Bligh, R. 277, 291, 292; Id. 316 to 322; Id. 335; Id. 371, 372; Id. 436, 452, 453; Ante, § 93 e.

[2] See Post, § 279, 280; Bac. Abridg. *Bailment*, C.

[3] Bac. Abridg. *Bailment*, C.

[4] 2 Black. Comm. 389.

[5] 2 Black. Comm. 391.

goods to another person for a particular use; as to a carrier to convey to London, to an innkeeper to secure in his inn, or the like. Here there is no absolute property in either the bailor or the bailee, the person delivering or him to whom it is delivered; for the bailor hath only the right, and not the immediate possession; the bailee hath the possession, and only a temporary right. But it is a qualified property in them both; and each of them is entitled to an action, in case the goods be damaged or taken away; the bailee, on account of his immediate possession; the bailor, because the possession of the bailee is, immediately, his possession also. So also, in case of goods pledged or pawned upon condition, either to repay money or otherwise; both the pledgor and pledgee have a qualified, but neither of them an absolute, property in them; the pledgor's property is conditional, and depends upon the performance of the condition of repayment, &c.; and so, too, is that of the pledgee, which depends upon its non-performance. The same may be said of goods distrained for rent, or other cause of distress; which are in the nature of a pledge, and are not, at the first taking, the absolute property of either the distrainor, or the party distrained upon; but may be redeemed, or else forfeited, by the subsequent conduct of the latter. But a servant, who hath the care of his master's goods or chattels, as a butler of plate, a shepherd of sheep, and the like, hath not any property or possession, either absolute or qualified, but only a mere charge or oversight."[1] The cases here put by the learned commentator, of qualified property, are clearly cases where the bailee has an interest or lien *in rem*. Mr. Justice Lawrence, on one occasion, said: "Absolute property is where one, having the possession of chattels, has also an exclusive right to enjoy them, and which can only be defeated by some act of his own. Special property is where he who has the possession holds them subject to the claims of other persons. There may be special property in various instances. There may be special property without possession; or there may be special property

[1] 2 Black. Comm, 395, 396. Sir James Mansfield, in Roberts *v.* Wyatt (2 Taunt. R. 268, 275), spoke of a temporary property in a thing, as contradistinguished from a special property.

arising simply out of a lawful possession, and which ceases when the true owner appears. Such was the case of Armory *v.* Delamirie."[1]

§ 93 *i.* Now, with reference to the case in judgment, the language of the learned Judge may be strictly correct; for it is by no means clear that the bankrupt had not an absolute property in the chattels, good against all the world, until his assignees asserted some title to it. The case cited, of Armory *v.* Delamirie, was the case of goods coming to the party's possession by finding, where he might justly be said to be entitled to it, as well as possessed of it, as absolute owner, against all the world, until the rightful owner appeared and claimed it; and if it was never claimed, his title as finder remained absolute. The case of a naked depositary does not seem to have been here presented to the mind of the learned Judge.[2] Indeed, there is no small refinement and subtilty in suggesting, that a person lawfully in possession of a thing has at the same time a special property therein against strangers, and no property at all against the true owner. What sort of special property is that, which has no existence against the owner of the thing, and yet at the same time has an existence against other persons? Can there be property and no property at the same time? If the language were, that, when a party has a right of possession, that right cannot lawfully be violated by mere wrongdoers; but, if violated, it may be redressed by an action of trespass or trover; it would be intelligible. If the language were, that a person may have a present temporary or defeasible property in a thing, subject to be devested by the subsequent claim of the rightful owner under his paramount title (such as in the case of the finder of chattels),[3] or a temporary property not special, which is to become absolute, or extinguished, by future events (such as the possession of an abstract of the title of the vendor by the vendee, under a contract for a sale and conveyance of real estate), there would be little difficulty in

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[1] 1 Str. R. 504; Webb *v.* Fox, 7 Term R. 391, 399.

[2] Bac. Abridg. *Bailment*, D.; Id. *Trespass*, C. 2; Id. *Trover*, C.

[3] Armory *v.* Delamirie, 1 Str. R. 504; Webb *v.* Fox, 7 Term R. 391, 399; Sutton *v.* Buck, 2 Taunt. R. 302.

comprehending the nature and quality of the right, as a *jus in re*.[1] It would be a present fixed right of property, subject to be devested or destroyed by matters *in futuro*. In short, it would be a defeasible, but vested interest *in rem*. But in the case of a naked deposit, by the very theory of the contract, the bailor never means to part for a moment with his right of property, either generally or specially, but solely with his present possession of it; and the undertaking of the bailee is not to restore any right of property, but the mere possession to the bailee. It is this change of possession which constitutes the known distinction between the custody of a bailee, and that of a mere domestic servant; for in the latter case there is no change whatever of possession in the goods, but the possession remains in the master, and the servant has but a charge, or oversight;[2] whereas, in the case of a bailee, there is a positive change of possession. The true description of the right conferred on a naked bailee is that which Mr. Justice Blackstone, in the passage before cited,[3] calls a "possessory interest," or right of possession, in contradistinction to a general or special property.

§ 94. But, whatever may be the true doctrine on this subject, whether, that the depositary has a special property in the deposit, or not, there is no doubt, that not only he, but the general owner, in virtue of his general ownership and right of possession, may also maintain a suit against a stranger, for an injury to it, or conversion of it.[4] Indeed, it is a general rule, that either the bailor or the bailee may, in such a case, maintain a suit for redress; and a recovery of damages by either of them will be a full satisfaction, and may be pleaded in bar of any subsequent suit by the other.[5]

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[1] Roberts *v.* Wyatt, 2 Taunt. R. 268, 275.

[2] 2 Black. Comm. 396; Ante, § 93 h.

[3] Ante, § 93.

[4] 2 Black. Comm. 453; Bac. Abridg. *Bailment*, A. B. C.; Id. *Trespass*, C.; Id. *Trover*, C.; Thorp *v.* Burling, 11 Johns. R. 285; Brownell *v.* Manchester, 1 Pick. 232. See Smith on Merc. Law, ch. 5, § 6, p. 117, 2d edit.

[5] Bac. Abridg. *Trespass*, C. 2; Id. *Trover*, C.; 2 Roll. Abridg. *Trespass*, P. pl. 5; Nicolls *v.* Bastard, 2 Cromp. Mees. & Rosc. 659, 660; 2 Saund. Rep. 47, c, Williams's note; Brook, Abridg. *Trespass*, pl. 67; Post, § 353.

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§ 95. The doctrine of the civil law coincides with what has been supposed to be the common law on the point, whether the depositary has a special property or not in the deposit. By the civil law the property of the thing remains in the depositor; and at most the possession only passes to the depositary. *Rei depositæ proprietas apud deponentem manet; sed et possessio, nisi apud sequestrem deposita est.*[1] Pothier states the doctrine quite as strongly. "In a true deposit," says he, "he who has deposited any pieces of gold or silver remains the proprietor of them, and he even continues the possessor of them, the depositary detaining them in the name of him who has made the deposit."[2] In the Scotch law it would seem, that, although the property and possession are in some sort severed by the deposit, the former belonging to the depositor and the latter to the depositary, yet the possession of the deposit is deemed for all effective purposes to remain with the depositor.[3] Perhaps, after all, the distinction here pointed out is not materially different from what is recognized in common law. The possession of the depositary is certainly, for many purposes, deemed the possession of the depositor in our law, both as to rights and remedies.[4] And it could scarcely have been the intention of the civil law to declare, that possession did not in fact pass to the bailee by the delivery of the deposit. It meant only to affirm, that the possession was not exclusive of that of the bailor; but rather in subordination to it.

§ 96. We may now pass to the consideration of another part of the duty of the depositary, and that is, his obligation to return the deposit, when it is required of him.[5]

§ 97. In the first place, the deposit is to be returned *in individuo*, and in the same state in which it was received.[6] If

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[1] Jones on Bailm. 80; Dig. Lib. 16, tit. 3, l. 17, § 1; Ayliffe, Pand. B. 4, tit. 17.

[2] Pothier, Traité de Dépôt, n. 82; Id. n. 12.

[3] 1 Bell, Comm. § 199, 4th edit.; 1 Bell, Comm. p. 257, 258, 5th edit.

[4] Ante, § 94.

[5] 1 Bell, Comm. § 199, 4th edit.; 1 Bell, Comm. p. 257, 5th edit.; Jones on Bailm. 36, 46.

[6] Code of Louisiana (1825), art. 2915, 2916.

it is lost or injured, or spoiled by the fraud or gross negligence of the depositary, he is responsible to the extent of the loss or injury.[1] If he has kept the deposit with the same care as his own goods of the same kind, this will ordinarily repel the presumption of fraud and gross negligence. Still, however, it must be under this reserve, that he has not omitted those common precautions, which other persons would not omit; such, for instance, as keeping money under lock and key.[2] *Latæ culpæ finis est, non intelligere id, quod omnes intelligunt.*[3] It follows, of course, that, where the deposit is lost, or perishes or is injured, either by accident, or by inherent defects, or by its own perishable quality, or even by the slight or ordinary neglect of the depositary, he is not chargeable.[4] If a part is lost, and a part remains, the latter is to be restored.[5] If, to save a perishable deposit, it has been sold by the bailee, the money is to be paid to the owner; for a necessary sale is good, and for his benefit.[6]

§ 98. Although the obligation to restore a deposit seems to flow from the first principles of the contract, as well as from natural justice; yet, in the reign of Queen Elizabeth, when it had been adjudged (as Sir William Jones has not scrupled to declare, consistently with common sense and common honesty,[7]) that an action on the case (assumpsit) lay against a man who had not performed his promise of redelivery, or of delivering over things bailed to him, that judgment was reversed, upon the ground, that the defendant had not any manner of profit to receive; but it was only a bare possession; and, therefore,

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[1] Jones on Bailm. 36, 46, 120; Foster *v.* Essex Bank, 17 Mass. R. 479; Stanton *v.* Bell, 2 Hawks, N. Car. Rep. 145; 1 Dane, Abridg. ch. 17, art. 1 and 2.

[2] 1 Domat, B. 1, tit. 7, § 3, art. 3, 4; Ante, § 63 to 74.

[3] Dig. Lib. 50, tit. 16, l. 223; Mytton *v.* Cook, 2 Str. 1099. See Rooth *v.* Wilson, 1 Barn. & Ald. 59; Ante, § 66.

[4] 1 Domat, B. 1, tit. 7, § 3, art. 5, 6; Jones on Bailm. 10, 46; Shields *v.* Blackburne, 1 H. Black. 162; Pothier, Traité de Dépôt, n. 42, 43, 44.

[5] Pothier, Traité de Dépôt, n. 44.

[6] Pothier, Traité de Dépôt, n. 45.

[7] Jones on Bailm. 51.

there was no sufficient consideration for it.[1] However, this doctrine was not then acquiesced in; but was soon afterwards overturned, and the doctrine was firmly established, which is now acted on, that assumpsit will lie in such a case.[2]

§ 99. The depositary is also bound to restore not only the thing deposited, but any increase or profits which may have accrued from it.[3] If an animal deposited brings forth young, the latter are to be delivered to the owner.[4] And by the civil and French law, if interest has been made upon money deposited, this also should be given up to the depositor.[5] If the depositary has used the money wrongfully, this seems a just and moderate compensation for the wrong. If the right to let the money, or to use it, followed from the bailment, it would cease to be a deposit, and fall under some other denomination.[6]

§ 100. If the depositary had sold the deposit, and afterwards repurchased it, he was by the civil law bound to restore the value, even if it was afterwards lost without his default; and the reason assigned is, that the original sale was a fraud upon the owner, and could not be purged away, but by a delivery of the thing itself to the owner. *Si rem depositam vendidisti, eamque postea redemisti, in causam depositi, etiamsi sine dolo malo postea perierit, teneri te depositi; quia semel dolo fecisti, cum venderes.*[7] The same rule is incorporated in the French law.[8] Our law would adjudge, in such a case, that the party should not be permitted to take advantage of his

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[1] Riches *v.* Brigges, Yelv. R. 4; s. c. Cro. Eliz. 883; S. P. Pickas *v.* Guile, Yelv. R. 128.

[2] Game *v.* Harvie, Yelv. R. 50; Wheatley *v.* Low, Cro. Jac, 668; Coggs *v.* Bernard, 2 Ld. Raym. 920.

[3] 2 Kent, Comm. Lect. 40, p. 566, 567, 4th edit.; Code of Louisiana (1825), art. 2919.

[4] Dig. Lib. 16, tit. 3, l. 1, § 23, 24; 1 Domat, B. 1, tit. 7, § 2, art. 9; 2 Kent, Comm. Lect. 40, p. 567, 4th edit.

[5] Pothier, Traité de Dépôt, n. 47, 48; Dig. Lib. 16, tit. 3, l. 1, § 29; Ayliffe, Pand. B. 4, tit. 17, p. 519, 523; Code Civil of France, art. 1936. See also, Morss *v.* Stone, 5 Barbour (N. Y.), R. 516.

[6] 1 Bell, Comm. § 199, 4th edit.; 1 Bell, Comm. p. 257, 5th edit.; Pothier, Traité de Dépôt, n. 9.

[7] Pothier, Traité de Dépôt, n. 43; Dig. Lib. 16, tit. 3, l. 1, § 25.

[8] Pothier, Traité de Dépôt, n. 43.

own wrong; and, that, as the sale was a conversion of the property, the right of action of the owner was then complete, and could not be varied, except as to the extent of the damages, even by a subsequent restitution to the owner.[1]

§ 101. Cases are also put in the Roman and French law, how far the heir or administrator of a deceased bailee is liable, if, in ignorance of the bailment, he sells the thing. It is held, that he is liable, not as in case of a tort, but for the price which he has received, and only when he has received it.[2] But the depositor, in such a case, may, at his election, proceed against the purchaser, or, if he has not paid the price, the heir will be bound to cede his right of action against him to the depositor.[3] Our law would probably treat the case as one of a conversion, and give the owner the value of the thing so sold; or would enable him, in most cases, at his election, to proceed against the vendee for restitution.[4]

§ 102. The next inquiry is, To whom is restitution to be made? Generally speaking, it is to be made to the bailor; although there may be special cases in which that would not be required or justified.[5] As, for instance, if goods have been deposited by a thief who has been convicted, and the owner reclaims them, the latter alone is entitled to receive them.[6] A question has often been raised, whether an innocent bailee is generally responsible to any other person than to him from whom he immediately received the goods, or, in case of his death, to his legal representatives. It was formerly held, that, if the goods of A are bailed by B to C, C must redeliver them to B; for (it was said), C cannot, as bailee, be allowed to remove or alter that possession which has been committed

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[1] 1 Roll. Abridg. *Action sur Case*, p. 5, L. pl. 1; Wheelock *v.* Wheelwright, 5 Mass. R. 104.

[2] Dig. Lib. 16, tit. 3, l. 1, § 47, l. 2; Pothier, Traité de Dépôt, n. 45, 46; Code Civil of France, art. 1935; Code of Louisiana (1825), art. 2918.

[3] Pothier, Traité de Dépôt, n. 45, 46; Code Civil of France, art. 1935; Code of Louisiana (1825), art. 2918.

[4] 2 Saund. R. 47 b, Williams's note.

[5] See Bates *v.* Stanton, 1 Duer, 79.

[6] Dig. Lib. 16, tit. 3, l. 31; Pothier, Traité de Dépôt, n. 51; Code Civil of France, art. 1937, 1938; Boardman *v.* Gore, 15 Mass. R. 331, 336 to 338.

to him in order to restore it to the right owner; for the right of restitution must be demanded of B, that did the injury, of which A, the bailee, has no pretence to judge; and, therefore, it would be downright treachery in him to deliver them to any other person than his bailor.[1] But it was said, that if A bails goods to B, to which C has a right, and B dies, there his executors are chargeable to C only, who has the right; for the executors came to the possession by the law, and therefore must deliver it to that person in whom the law has established the property.[2] This doctrine, however, even in regard to the bailee himself, was probably limited to cases where the bailor came to the possession of the goods by right; for, if he came to them by wrong, it would seem that the owner might reclaim them from any person in whose possession they were found.[3] But the doctrine itself may now justly be deemed overruled; and the right of the owner to recover his property in all cases, against a person having no title, whether a bailee or not, and whether a first or a second bailee, seems now fully established in our law, upon the plain reason, that the bailee can never be in a better situation than his bailor. If the latter has no title, the real owner is entitled to recover the property, in whose hands soever it may be found.[4] Recent cases have also decided, that if a bailee of goods for a particular purpose transfers them in contravention of that purpose, even although it be to a *bonâ fide* vendee without notice, the latter cannot resist the claim of the owner.[5] And, *à fortiori*, if the bailee

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[1] Bac. Abridg. *Bailment*, A.; 3 Reeves's Hist. 449, 453; 1 Roll. Abridg. *Detinue*, C. 606, 607; Fitz. N. B. 138, M.; Bro. Tresp. 216, 295; 2 Saund. 47 b, Williams's note; 6 Mod. 216; Post, § 105, 281.

[2] Bac. Abridg. *Bailment*, A.; 8 Hen. 6, 58; 1 Roll. Abridg. *Detinue*, C. pl. 3.

[3] Taylor *v.* Plumer, 3 M. & Selw. 562. See Hardman *v.* Willcock, 9 Bing. R. 382, note.

[4] Ibid.; Wilson *v.* Anderton, 1 Barn. & Ad. 450; Ogle *v.* Atkinson, 5 Taunt. 759; Cheesman *v.* Excell, 4 Eng. Law & Eq. R. 438; Bates *v.* Stanton, 1 Duer, 79; Pitt *v.* Albritton, 12 Iredell, 77; Post, § 132, 281.

[5] Wilkinson *v.* King, 2 Camp. R. 335; Loeschman *v.* Machin, 2 Stark. R. 311; Cooper *v.* Willomatt, 1 Mann. Grang. & Scott, R. 672; 2 Saunders, R. 47 b, Williams and Patterson's note (e); Hartop *v.* Hoare, 3 Atk. 44. See also Hardman *v.* Willcock, 9 Bing. R. 382, note.

has obtained the goods upon a claim of ownership not made out, and under an agreement, that, if the claim is unfounded, they shall be restored to him, the bailee cannot retain them against the true owner.[1]

§ 103. If a bailor, after a deposit, transfers to another person, his right to the thing deposited, the latter cannot (it is said), at law, compel a delivery of it to himself; but the bailee, if he chooses, may deliver it to the person to whom it is transferred, and it will be a justification.[2] But, if A delivers goods to B, to be delivered over to C, there C hath the property, and may demand the goods, if B undertakes to make the delivery to C, and hath no interest or claim, but for that purpose.[3] But in all such cases there must be a clear assent on the part of B to such undertaking, otherwise no action will lie by C; and the mere receipt of the goods will not be sufficient to establish such assent.[4] It has been settled by several modern decisions, that, in case of a remittance of a bill to an agent or banker, with directions to apply a part of it to the payment of a debt due to a third person, the mere fact of a receipt of the remittance does not, unless the remittee assents to such disposition of the proceeds, and agrees to pay over the same to the creditor, amount to such an appropriation of the proceeds, as will enable such creditor to recover the same against the remittee.[5] The same principle has been applied to a consignment of goods for sale, with directions to make payment of a debt out of the proceeds to a creditor.[6]

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[1] Hurd *v.* West, 7 Cowen, R. 752.

[2] Rich *v.* Aldred, 6 Mod. R. 216. But quære; and see Post, § 265, 266, 282. In 1 Roll. Abridg. *Detinue*, C. pl. 2, 3, p. 605, it is said, that the grantee may have an action of detinue in such a case; and 9 Hen. 6, 64 (b), is cited in support of it. There would be a clear remedy in equity, if there were none at law, in such a case. Com. Dig. *Chancery*, 4, W. 5; Id. 2, A. 1; Post, § 282.

[3] Bac. Abridg. *Bailment*, D.; 1 Bulst. 68; 1 Roll. Abridg. *Detinue*, C. 606; 9 H. 6, 58. See also, Israel *v.* Douglas, 1 H. Black. 239.

[4] See 2 Story on Eq. Jurisp. § 1041 to 1046, and notes to 2d edit. (1839).

[5] Williams *v.* Everett, 14 East, 582; 2 Story on Eq. Jurisp. § 1041 to 1046.

[6] Williams *v.* Everett, 14 East, R. 582; Yates *v.* Bell, 3 Barn. & Ald. 643; Stewart *v.* Fry, 7 Taunt. R. 339; Grant *v.* Austen, 3 Price, R. 58; Wedlake *v.* Hurley, 1 Lloyd & Wels. 330; Tiernan *v.* Jackson, 5 Pet. Sup. Ct. R. 580; 2 Story on Eq. Jurisp. § 1041 to 1046.

§ 104. It has been further asserted to be the law (although it is open to much question), that, if goods are delivered to a bailee, to be delivered over to another, and afterwards an action is brought against him by one who hath a right to the goods, the defendant may, pending the action, deliver over the goods to the person to whom upon the bailment they were deliverable, and he will be discharged.[1] [And at all events a delivery over by the bailee in good faith before he is informed of the claim of the true owner, is a good defence to such claim.][2] However, a bailor, where the delivery over is not for a valuable consideration, may at any time countermand his bailment; and after such countermand, a delivery over by his bailee will not be good.[3]

§ 105. If a bailee delivers the goods to a second bailee, the first bailee may demand and recover the same from the second bailee, because the latter hath the possession of the former, and undertakes for the custody.[4] But the original bailor may also demand and recover the same from either bailee, because he has the property, and both are bound to answer to him.[5] A like action is given to the bailor by the civil law in the case of a second bailment.[6] If the second bailee has delivered the goods to the original bailor, it is said, that it is no bar to a suit by the first bailee against him.[7] But this doctrine seems at all times to have been questionable.[8] And it may be now considered as entirely exploded, both in England and America, by the recent authorities.[9] If the bailee should

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[1] Fitz. N. B. 138, M.; Bac. Abridg. *Bailment*, D.; 1 Roll. Abridg. *Detinue*, D. 607; Post, § 281, 282.

[2] Nelson *v.* Iverson, 17 Ala. 216.

[3] Bac. Abridg. *Bailment*, D.; 2 Story, Eq. Jurisp. § 1045, 1046, 2d edit. 1839.

[4] 1 Roll. Abridg. *Detinue*, C. pl. 6; Ante, § 102.

[5] Isaac *v.* Clark, 2 Bulst. 306, 312, per Coke, C. J.; Bac. Abrig. *Bailment*, D.; 1 Roll. Abridg. *Detinue*, C. p. 606, pl. 4; 9 Hen. 6, 58. See Gosling *v.* Birnie, 7 Bing. R. 339; Ante, § 102.

[6] Pothier, Traité de Dépôt, n. 63.

[7] 1 Roll. Abridg. *Detinue*, C. p. 606, pl. 5; 9 Hen. 6, 58.

[8] See Flewellin *v.* Rave, 1 Bulst. 69; 1 Roll. Abridg. *Detinue*, C. p. 607, pl. 7.

[9] Ogle *v.* Atkinson, 5 Taunt. 759; Wilson *v.* Anderton, 1 Barn. & Ad. 450; Whittier *v.* Smith, 11 Mass. R. 211; Learned *v.* Bryant, 13 Mass. R. 224.

lose the goods bailed, and a stranger, finding them, should deliver them to the true owner, there the finder would not be liable to the bailee; for he does not come in in privity under the bailment.[1] But it is said, that, if a recovery is had by a third person against a stranger, so finding the goods, he will still be liable to the true owner of them in an action; for it is no answer to the true owner, that another has recovered from the finder what he had no right to.[2] Whenever such a question shall again arise, it will probably be thought worthy of further consideration, especially if the finder has had no notice of the true ownership at the time of the first suit and recovery against him.

§ 106. Where a deposit has been made by a servant in behalf of his master, the goods are to be redelivered to the master, especially if he gives notice that they are not to be redelivered to the servant. But a delivery back to the servant would, in many cases, and especially where there was no reason to suspect any impropriety, be a good discharge.[3]

§ 107. No right of action, however, accrues in any case against the bailee, unless there has been some wrongful conversion or some loss by gross negligence on his part, until after a demand made upon him, and a refusal by him, to redeliver the deposit.[4] A demand and refusal is ordinarily evidence of a conversion; unless the circumstances constitute a just excuse, or a justification of the refusal.[5]

§ 108. The civil law and the French law coincide, in many respects, with ours, in the particulars above mentioned. In the civil law, the depositary was generally bound to restore the goods to the depositor. But if the right owner appeared, he

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[1] 1 Roll. Abridg. *Detinue*, C. p. 606, 607, pl. 9.

[2] 1 Roll. Abridg. *Detinue*, C. 667; Bac. Abridg. *Bailment*, D.

[3] 1 Domat, B. 1, tit. 7, § 1, art. 6; Pothier, Traité de Dépôt, n. 49.

[4] Brown *v.* Cook, 9 Johns. R. 361; Hosmer *v.* Clarke, 2 Greenl. R. 308.

[5] Brown *v.* Cook, 9 Johns. R. 361; Chancellor of Oxford's case, 10 Co. Rep. 56; 1 Roll. Abridg. 5, l. 45; Cranch *v.* White, 1 Bing. N. Cas. 414; Wilson *v.* Anderton, 1 Barn. & Adolph. 450; Green *v.* Dunn, 3 Camp. R. 215, n.; Gunton *v.* Nurse, 2 Brod. & Bing. 447; Verrall *v.* Robinson, 2 Cromp. Mees. & Rosc. 495; Philpott *v.* Kelley, 3 Adolph. & Ellis, 106; Magee *v.* Scott, 9 Cush. 148.

might deliver them to him;[1] and especially if they were stolen from the owner.[2] If, however, the real owner, even in case of theft, did not make known his claim, or demand them from the depositary, the latter might restore them to the depositor. *Quod, si ego ad petenda ea non veniam, nihilominus ei restituenda sunt, qui deposuit, quamvis malè quæsita deposuit.*[3] If the ownership was doubtful, or the right was disputed by the depositor, the depositary had a right to detain the property, until the right was ascertained, and thus he became, as it were, pending the dispute, a judicial depositary or sequestrator.[4] And the real owner, who, in ignorance of his rights, became a depositary, might always retain the deposit, unless some superior right attached in it to the depositor.[5] The French law does not, in these respects, materially differ from the civil law.[6] In case of stolen goods, the code of France requires, that the bailee shall give notice to the owner, and if the owner fails to claim the goods in a limited time, he may safely redeliver them to the depositor.[7] The code of Louisiana adopts the same rule.[8] But generally, in other cases, the depositary is bound to deliver the goods to the party on whose account he received them, whatever may be the claims of other persons.[9] And this rule, it seems, will apply to a bailment by a servant of his master's property, where it has been bailed in his own name, and not in the name of his master.[10]

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[1] Dig. Lib. 16, tit. 3, l. 31, § 1; Ayliffe, Pand. B. 4, tit. 17, p. 522; Code Civil of France, art. 1937, 1938; Pothier, Traité de Dépôt, n. 51. See Code of Louisiana (1825), art. 2905, 2920.

[2] Ibid.; Ante, § 52.

[3] Dig. Lib. 16, tit. 3, l. 31, § 1; Pothier, Traité de Dépôt, n. 51.

[4] 1 Domat, B. 1, tit. 7, § 1, art. 5, 6; Ayliffe, Pand. B. 4, tit. 17, p. 520; Pothier, Traité de Dépôt, n. 51; Code of Louisiana (1825), art. 2905.

[5] Dig. Lib. 16, tit. 3, l. 31, § 1; Pothier, Pand. Lib. 16, tit. 3, n. 9; Code Civil of France, art. 1946; Code of Louisiana (1825), art. 2930.

[6] Pothier, Traité de Dépôt, n. 49 to 52, &c.; Id. ch. 2, § 1, art. 3, n. 67.

[7] Code Civil of France, art. 1938.

[8] Code of Louisiana (1825), art. 2920, 2921; Jenkinson *v.* Cope's Executors, 7 Martin, R. 284.

[9] Code Civil of France, B. 3, art. 1937, 1938; Pothier, Traité de Dépôt, n. 51; Jenkinson *v.* Cope's Executors, 7 Martin, R. 284; Butler *v.* Kenner, 14 Martin, R. 274; Code of Louisiana (1825), art. 2915, 2920.

[10] Pothier, Traité de Dépôt, n. 49.

§ 109. Where a deposit is made by a party in a special character, as in the character of guardian, or executor, or trustee, there, if the trust has terminated, as if the guardianship has ceased, or the executor has been removed and a new administrator appointed, the delivery should be to the party entitled of right to the property.[1] Thus, if the ward has come of age, the delivery should be to him; or in case of a new administrator, the delivery should be to him.[2] And the like rule applies, where a third person has, by forfeiture or otherwise, succeeded to the right of property;[3] as in case of a forfeiture for crimes; or the subsequent marriage of a female bailor; or the guardianship of a person, who since the bailment has become *non compos mentis*. The French law furnishes a similar rule;[4] and, indeed, it is so consonant to common sense, that it would seem to be a principle of universal justice.

§ 110. It may be asked, What is to be done by a bailee, where different persons claim the same thing from him under different titles? Is he to be subject to the action of each, and thus to run the chance of a double recovery against him? Or may he protect himself by any legal proceedings? We have already seen that he may, in certain cases, compel the adverse parties to litigate the right by interpleading at law, or in equity.[5] But this right is principally limited to cases of privity between the parties, as, for instance, between the bailor and a second bailee, where the latter may compel the first bailee to interplead. But where the parties claim in absolute adverse rights, not founded in any privity of title, or any common contract, there the bailee must defend himself as well as he may; for, generally speaking, he cannot compel mere strangers to interplead with each other, and especially if any tort has inter-

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[1] Code Civil of France, art. 1941; Pothier, Traité de Dépôt, n. 50; Code of Louisiana (1825), art. 2922, 2923.

[2] Pothier, Traité de Dépôt, n. 50.

[3] Id. n. 52; Bac. Abridg. *Bailment*, B.

[4] Code Civil of France, B. 3, tit. 11, art. 1940, 1941; Pothier, Traité de Dépôt, n. 51; Code of Louisiana (1825), art. 2922, 2923.

[5] Rich *v.* Aldred, 6 Mod. R. 216, Coop. Eq. Pl. 45 to 50; Isaac *v.* Clark, 2 Bulst. R. 306, 313; Ante, § 52; 2 Story on Eq. Jurisp. § 801 to 823.

vened.[1] Indeed, our law goes to the extent of ordinarily denying to a bailee any right to set up the interest or title of a third person against the title of his own bailor. And if he should give a receipt to such third person, acknowledging that he held the property for him, it would amount to a conversion of the property, for which his bailor might maintain an action.[2]

§ 111. Although the subject of interpleader, in cases of this sort, belongs properly to another branch of law, it may not be without use to add here some explanations of it. In cases of bailments (as we have had occasion to state), the common law in certain cases enabled the bailee, if sued, to call upon the other proper parties, who were interested in the property, to appear and contest the title between themselves, and thus to exonerate him from responsibility.[3] Thus, by the common law, if two persons deposited deeds or chattels with a third, to be redelivered according to the terms of an agreement, and one of them brought an action of detinue against the depositary, the latter might, upon a suitable allegation, by a proceeding called garnishment, which is in effect a notice of the suit, compel the other depositor to appear and become defendant in the action in his stead. And if the bailee was sued in separate actions of detinue by two depositors upon such a deposit, or by any two persons, each claiming to be the owner of goods, which he had found, he might in like manner allege the deposit or finding on the record, and compel them to interplead. But, as these proceedings by garnishment and interpleader were not allowed in any personal action, except that of detinue[4] (a form of action which has of late fallen into much disuse), no practical advantage has been derived from them in modern times. The only course now resorted to for the relief of a person sued, or in danger of being sued by several claimants, is that of filing a bill to compel the parties, by the authority of a court of equity to interplead either at law or in equity.[5]

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[1] Viner, Abr. *Enterpleader*, L. M. N., &c. See Rich *v.* Aldred, 6 Mod. R. 216; 3 Reeves's Hist. of the Law, 450 to 453; 7 Dane, Abr. ch. 226, art. 9, § 4; 2 Story on Eq. Jurisp. § 812 to 820. See Story on Agency, § 217.

[2] Story on Agency, § 217; Holbrook *v.* Wight, 24 Wend. R. 169.

[3] Ante, § 52.

[4] 3 Reeves's Hist. of the Law, 449; 2 Story on Eq. Jurisp. § 801 to 804.

[5] See 2 Story on Eq. Jurisp. § 805 to 809; Id. § 814 to 820.

§ 112. From this description of interpleader at the common law, it is obvious, that, with the exception of cases of the finding of goods, it is confined to cases where there is a privity between the parties. So that the remedy is not only restricted to actions of detinue, but falls far short of adequate relief, even in actions of that sort. Courts of equity are more liberal in granting relief, not only when suits are brought at law, but when they are threatened. But the relief even here is not, perhaps, in all cases, coextensive with the mischief; for the claim in each case must be of the same nature, or for the same duty, and be founded in privity.[1] At least, the claim must grow out of some transaction, in which the defendant is a mere stakeholder, or bailee, and disconnects himself from any tort in regard to the conflicting titles.[2]

§ 113. It would seem, that the civil law and the French law do not exactly limit the rights of the bailee in the same manner as our law, in cases requiring an interpleader by third persons. On the contrary, wherever an adverse right is set up, and especially if the property is arrested in the hands of the depositary, he is not bound to deliver it to either party until the title is established; or, at all events, not until one party, after notice, has refused to proceed,[3] so as to decide in a fit suit the title to the property.

§ 114. Another inquiry may be, what is the duty of a depos-

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[1] 2 Story on Eq. Jurisp. § 812 to 817, 820.

[2] Eden on Injunctions, p. 339 et seq. 342; 2 Ves. jr. 101; 1 Ves. & B. 334; 1 Merivale, R. 405; 3 Madd. R. 277, 564; 5 Madd. R. 47; 1 Montague, Pl. in Equity, 232, &c.; 2 Mont. Pl. in Eq. 380, 397, &c.; Hinde, Prac. 26; Cooper, Eq. Pl. 45 to 50; Bridgman's Prac., Index, Bill, 9, *Interpleader;* Wilson *v.* Anderton, 1 Barn. & Adolph. R. 450, 456. This account of the proceedings by garnishment is copied almost verbatim from a recent Report made to Parliament by the Common Law Commissioners, and ordered to be printed by the House of Commons, on the 8th of March, 1830, p. 25. For further information, the reader is referred to 3 Reeves's Hist. of the Law, 448 to 453; Eden on Injunctions, 335 et seq.; Cooper, Eq. Pl. 45 to 50; 1 Mont. Pl. in Eq. 232; 2 Mont. Pl. in Eq. 380, 382, note, X. P.; Viner, Abridg. *Enterpleader*, L. M. N.; Bac. Abridg. *Bailment*, D.

[3] 1 Domat, B. 1, tit. 7, § 1, art. 5, 6; Pothier, Traité de Dépôt, n. 51, 59; Ayliffe, Pand. B. 1, tit. 7, p. 519, 520; Code Civil of France, art. 1937, 1944; Ersk. Inst. B. 3, tit. 1, § 27; Code of Louisiana (1825), art. 2905.

itary, in cases where there has been a joint bailment to him? Generally speaking, he is not bound to redeliver the deposit without the consent of all the parties to the bailment.[1] But this rule applies in strictness to those cases only where the bailment has been joint; and not where the interest in the deposit is joint, but there has been a delivery by one of the joint owners, without any consent or privity of the other owners.[2] There may also be a joint deposit, where a several delivery to each person of his share is expressly provided for in the original contract; and in such a case, a several action will accrue to each owner upon a demand of his own share.[3] If the property deposited belongs jointly to the depositor and depositary, this, as we have seen, in no respect varies the ordinary obligations of law, as to the care which he is bound to take of it.[4] But in cases of joint deposit, where there are many owners, and the depositary is one, it seems, that, if either of the other owners gets the deposit out of his possession against his will, he is remediless; for it has been decided, that, in such a case, he cannot recover back the deposit, although the delivery is upon a special trust for all the owners, and although he has given a bond for the safe custody of it.[5] If this decision be correct, it is full of hardship and inconvenience. It is full of hardship; for it takes away from the depositary the means of preserving his exclusive possession and safe custody; and yet does not seem to exonerate him from responsibility for such safe custody under his bond. It is full of inconvenience; for it disables joint owners, in case of any personal distrust, from protecting their several rights by a mutual deposit, for the benefit of all, in the custody of one who may enjoy the respect and confidence of all. It enables one owner, in violation of his contract, by fraud or stratagem, to put at hazard the joint property, or even to apply it to purposes

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[1] 2 Kent, Comm. p. 566, 567, 4th edit.; May *v.* Harvey, 13 East, R. 197.

[2] May *v.* Harvey, 13 East, R. 197. See 1 Roll. Abridg. *Enterpleader*, E.; Brook, Abridg. *Bailment*, pl. 4.

[3] Dig. Lib. 16, tit. 3, l. 1, § 44.

[4] Jones on Bailm. 82, 83.

[5] Holliday *v.* Camsell, 1 T. Rep. 658.

wholly different from those for which it is held. It deserves consideration, therefore, whether in such a case, the bailee, in virtue of his special undertaking, may not fairly be held to have a special interest, or property, or lien in the thing, as an indemnity against his own responsibility upon his bond, in virtue of an implied contract to this effect, evidenced by the very nature of the deposit.

§ 115. The civil law provided, that in cases of joint deposits, restitution should be to all together, and not to one or more of the joint owners. This rule applied with more force and strictness, where the thing was indivisible, or was deposited as one thing, than where it was severable, or composed of different parcels. However, if the thing were divisible, as a sum of money, and the parties were agreed as to their shares, the depositary might divide it, and each was at liberty to receive his own. And so, in case of a joint deposit, the depositary was discharged by a delivery to any one, if such was the special agreement of the parties at the time of the deposit.[1] The same general rule, as to the necessity of joint restitution, was applied to the case of co-heirs, where the depositor died.[2] However, it would seem that the depositary might, if the thing were divisible, deliver the share of each heir to him personally; and in case of an insolvency of the depositary before all the heirs had received their shares, the heir who had received his would not be bound to contribution for the loss of his co-heirs.[3] If any dispute arose as to the shares, or title of the heirs, the depositary was not bound to deliver up the property without security, or until the title was judicially ascertained.[4] The old French law closely followed the substance of these provisions;[5] and they stand incorporated into the present civil code of that kingdom.[6] If a deposit is bequeathed as a legacy, after the

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[1] 1 Domat, B. 1, tit. 7, § 3, art. 11, 12, 13; Dig. Lib. 16, tit. 3, l. 1, § 36, l. 14; Id. l. 1, § 44.

[2] Ibid.

[3] 1 Domat, B. 1, tit. 7, § 3, art. 12; Dig. Lib. 16, tit. 3, l. 14; Cod. Lib. 4, tit. 4, l. 12; Code of Louisiana (1825), art. 2922.

[4] 1 Domat, B. 1, tit. 7, § 3, art. 11; Dig. Lib. 16, tit. 3, l. 1, § 36.

[5] Pothier, Traité de Dépôt, n. 54, 62.

[6] Code Civil of France, art. 1939.

assent of the executor to it, it may be delivered over to the legatee; and after such assent it is held to the use of the legatee, although not before.[1]

§ 116. Where there are two or more joint depositaries, they are each liable for the restitution of the whole deposit. And consequently, each in effect becomes a guarantor against the fraud and gross negligence of the other. Domat so interprets the civil law. *Si apud duos sit deposita res, adversus unumquemque eorum agi poterit. Nec liberabitur alter, si cum altero agatur. Non enim electione, sed solutione liberantur.*[2] Pothier thinks, that an exception lies, or ought to lie, in favor of the depositary who is not guilty of fraud, at least when he has not actually bound himself for the good conduct of the other.[3]

§ 117. The next inquiry is, as to the place where restitution is to be made. If a particular place is agreed on between the parties, that of course is to regulate the matter.[4] If no place is agreed on, the property ought to be restored at the place where it is found, or where it ought to be kept. *Depositum eo loco restitui debet, in quo sine dolo ejus est, apud quem depositum est; ubi vero depositum est, nihil interest.*[5] The modern Code of France prescribes, that, if the contract does not particularize the place where the restitution is to be made, it must be made at the very place where the deposit was made.[6] Such also is the law of Louisiana.[7] If it is fraudulently or improperly removed to another place, the depositor is not bound to receive it there.[8] On the other hand, the depositor cannot demand it at an improper place, nor the depositary insist upon its being

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[1] Pothier, Traité de Dépôt, n. 55; Toller on Executors, B. 3, ch. 4, § 2.

[2] 1 Domat, B. 1, tit. 7, § 1, art. 14; Dig. Lib. 16, tit. 3, l. 1, § 43.

[3] Pothier, Traité de Dépôt, n. 64.

[4] Dig. Lib. 16, tit. 3, l. 12; Pothier, Traité de Dépôt, n. 56; Code Civil of France, art. 1942; Code of Louisiana (1825), art. 2924.

[5] Dig. Lib. 16, tit. 3, l. 12, § 1; Pothier, Traité de Dépôt, n. 56. See 2 Hurl. & Norm. 494.

[6] Code Civil of France, art. 1943. This differs from the rule laid down in Pothier, Traité de Dépôt, n. 57, which conforms to the civil law.

[7] Code of Louisiana (1825), art. 2925.

[8] Pothier, Traité de Dépôt, n. 56; Dig. Lib. 16, tit. 3, l. 12, § 1; 1 Domat, B. 1, tit. 7, § 3, art. 8.

received at such place. It is difficult to lay down any general rule, as to the place of restitution, other than this, that ordinarily it may be at the place of deposit,[1] unless some other place is agreed upon, or is implied from the nature of the transaction. If the deposit is of a nature to be kept at the domicile of the depositary, that will ordinarily be the place where it is to be restored, even when his domicile has been changed. But this, and indeed every other rule on the subject, must admit of exceptions. Much must depend upon the particular circumstances of the case, and the presumed intention of the parties. It cannot, for instance, be presumed that a depositor could intend, that, if the depositary removed to another country, he should carry the deposit with him; or, on the other hand, that if the depositary should remove to another street or town, he might not take the deposit with him, and deliver it there.[2]

§ 118. Whenever by the contract it is agreed, that the deposit may be restored in any one of several places, the civil law would give to the depositary the choice of the place.[3] In our law, it would depend upon the particular structure of the agreement, or the presumed intention of the parties, deducible from all the circumstances of the case. If the agreement did not expressly give the choice of place to the depositor, the natural inference would be, that the choice was given to the depositary, as the law would not incline to impose a burden upon him, when his undertaking was wholly gratuitous.

§ 119. It is also laid down in the civil law, that, if a deposit is made to be restored at a future time, it may be imme-

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[1] Code Civil of France, art. 1942, 1943.

[2] Mr. Chancellor Kent has deduced from the cases the following general doctrine: that, where a bailee promises to deliver specific goods on demand, though the demand may be made wherever he may be at the time, his offer to deliver at the place where the property is, or at his dwelling-house or place of business, will be sufficient. This doctrine seems highly reasonable, and is supported by the cases which he cites, which are cases of a depositary of goods, who has received them, as a bailee of a sheriff, or other ministerial officer. 2 Kent, Comm. Lect. 39, p. 508, 4th edit. See Scott *v.* Crane, 1 Conn. R. 255; Higgins *v.* Emmons, 5 Conn. R. 76; Mason *v.* Briggs, 16 Mass. R. 453; Slingerland *v.* Morse, 8 Johns. R. 474; Post, § 261, and note.

[3] 1 Domat, B. 1, tit. 7, § 3, art. 11; Dig. Lib. 16, tit. 3, l. 5, § 1.

diately demanded back by the depositor; for as the depositary has no interest in the custody, he can have no right to retain the thing against the will of the depositor. *Si deposuero apud te, ut post mortem tuam reddas; et tecum; etcum hærede tuo, possum depositi agere. Possum enim mutare voluntatem, et ante mortem tuam depositum repetere.*[1] This rule seems not unreasonable in ordinary cases, and is adopted into the French law,[2] and that of Louisiana.[3] How far it would be adopted into our law may admit of some doubt; for the general tendency of our law is to act upon the contracts of parties, exactly as they have made them. And, although cases may easily be imagined, in which the detainer might be deemed wholly inexcusable in point of justice and reason; yet other cases may be put, in which the particular time might be very important, as an inducement for the depositary to receive the deposit.

§ 120. There are certain other cases put in the foreign law, which may constitute an excuse for non-delivery, or an exception to the obligation of the depositary to deliver the deposit, when demanded. If, for instance, the depositary has it not at the place where it is demanded, Pothier seems to think, that time ought to be allowed him, even although he is bound to deliver it there.[4] Doubtless, also, by our law, the demand must be made at a reasonable time; and a reasonable time must be allowed to redeliver the property. Another case of exception or excuse is, where the property is arrested or attached by a third person; and this applies as well in our law, as in the French.[5] If the property is lawfully taken from the possession of the depositary by process of law, as if it is taken in execution, as the property of the bailor, the depositary will be excused; unless, indeed, some previous conversion or injury to it has occurred from the tortious act or gross negligence of the depositary; for in that case, he must answer for the wrong or injury. So, if the deposit is recovered from the

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[1] Dig. Lib. 16, tit. 3, l. 1, § 45; 1 Domat, B. 1, tit. 7, § 1, art. 7.

[2] Pothier, Traité de Dépôt, n. 58; Code Civil of France, art. 1944.

[3] Code of Lousiana (1825), art. 2926.

[4] Pothier, Traité de Dépôt, n. 59.

[5] Ibid.; Code Civil of France, art. 1944; Post, § 266.

bailee by one who possesses a paramount title; for he is only liable for a loss by a gross negligence; and he cannot help a recovery by law against him.[1] Another case of exception or excuse is, where a party, as heir or executor, demands the property. In such a case, the depositary is not bound to deliver it, until the party has proved his title or character.[2] And this is also true in our law; for the party must give reasonable proof of his title.[3]

§ 121. The depositary is generally entitled to be reimbursed all the necessary expenses, to which he has been subjected for the preservation of the deposit. And by the Roman and French law, he is entitled to a lien for all such expenses upon the deposit.[4] He has not, however, any right to detain it for any other debt, on any other account, than for such expenses.[5] The Roman and French law also give the depositary a right of indemnity for all losses occasioned by the deposit.[6] Whenever he has a lien, he may of course detain the deposit, until the lien is fully discharged.

§ 121 *a*. In respect to involuntary deposits, and deposits by finding, the question may also arise as to the right of the depositary to be paid his necessary and reasonable expenses for preserving and keeping the property. It is certain, that at the common law he has no lien therefor; but the just doctrine seems to be, although, perhaps, there is no direct and positive

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[1] Edson *v.* Weston, 7 Cowen, R. 278; Shelbury *v.* Scotsford, Yelv. R. 23; Post, § 266.

[2] Pothier, Traité de Dépôt, n. 59; Code Civil of France, art. 1944.

[3] Green *v.* Dunn, 3 Camp. R. 215, n.; Solomons *v.* Dawes, 1 Esp. R. 83.

[4] Ayliffe, Pand. B. 4, tit. 17, p. 521, 522; 1 Domat, B. 1, tit. 7, § 2, art. 1, 2, 3; Pothier, Traité de Dépôt, n. 59, 69, 74; Code Civil of France, art. 1948; Code of Louisiana (1825), art. 2927, 2931.

[5] Domat, B. 1, tit. 7, § 3, art. 14; Pothier, Traité de Dépôt, 59; Id. Oblig. n. 589 [624]; Code Civil of France, art. 1947, 1948; Code of Louisiana (1825), art. 2927.

[6] Code Civil of France, art. 1948, 1949; Pothier, Traité de Dépôt, n. 70. The French law carries the right of indemnity further; for if a slave is placed in deposit with a friend, and he should break open a chest of the depositary, and steal his money, and escape with it, the depositor would be bound to repay the money. Pothier, Traité de Dépôt, n. 70. And this is in accordance with the rule of the civil law. Dig. Lib. 47, tit. 2, l. 61, § 5; Post, § 624.

adjudication, that the depositary may rightfully claim and recover such expenses in an action.[1] The foreign law would,

[1] Nicholson *v.* Chapman, 2 H. Black. R. 254. In this case a quantity of timber was placed in a dock in the Thames; but the ropes, by which it was fastened accidentally got loose, and it floated on a towing-path on the banks of the river, and was there left by the tide at low-water. The bailiff of the manor, on which it was left, removed it at some expense. In an action of trover, brought by the owner of the timber, it was held, that there was no lien for the expense; and that the action was maintainable. Lord Chief Justice Eyre, in delivering the opinion of the Court, said: "The only difficulty that remained with any of us, after we had heard this case argued, was upon the question, whether this transaction could be assimilated to salvage. The taking care of goods left by the tide upon the banks of a navigable river, communicating with the sea, may in a vulgar sense be said to be salvage; but it has none of the qualities of salvage, in respect of which the laws of all civilized nations, the laws of Oleron, and our own laws in particular, have provided, that a recompense is due for the saving, and that our law has also provided, that this recompense should be a lien upon the goods which have been saved. Goods carried by sea are necessarily and unavoidably exposed to the perils which storms, tempests, and accidents (far beyond the reach of human foresight to prevent), are hourly creating, and against which it too often happens, that the greatest diligence and the most strenuous exertions of the mariner cannot protect them. When goods are thus in imminent danger of being lost, it is most frequently at the hazard of the lives of those who save them that they are saved. Principles of public policy dictate to civilized and commercial countries, not only the propriety, but even the absolute necessity, of establishing a liberal recompense for the encouragement of those who engage in so dangerous a service. Such are the grounds upon which salvage stands. They are recognized by Lord Chief Justice Holt in the case which has been cited from Lord Raymond and Salkeld. But see how very unlike this salvage is to the case now under consideration. In a navigable river, within the flux and reflux of the tide, but at a great distance from the sea, pieces of timber lie moored together in convenient places; carelessness, a slight accident, perhaps a mischievous boy, casts off the mooring rope, and the timber floats from the place where it was deposited, till the tide falls, and leaves it again somewhere upon the banks of the river. Such an event as this gives the owner the trouble of employing a man, sometimes for an hour, and sometimes for a day, in looking after it, till he finds it, and brings it back again to the place from whence it floated. If it happens to do any damage, the owner must pay for that damage; it will be imputable to him as carelessness, that his timber, in floating from its moorings, is found damage feasant, if that should happen to be the case. But this is not a case of damage feasance. The timber is found lying upon the banks of the river, and is taken into the possession and under the care of the defendant, without any extraordinary exertions, without the least personal risk, and in truth with very little trouble. It is, therefore, a case of

without doubt, inculcate the equitable doctrine,[1] allowing a lien for all such expenses. And if the owner offers a [specific] re-

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mere finding, and taking care of the thing found (I am willing to agree), for the owner. This is a good office, and meritorious, at least in the moral sense of the word, and certainly entitles the party to some reasonable recompense from the bounty, if not from the justice, of the owner; and of which, if it were refused, a court of justice would go as far as it could go towards enforcing the payment. So it would if a horse had strayed, and was not taken as an estray by the lord under his manorial rights, but was taken up by some good-natured man, and taken care of by him, till, at some trouble and perhaps at some expense, he had found out the owner. So it would be in every other case of finding, that can be stated (the claim to the recompense differing in degree, but not in principle); which, therefore, reduces the merits of this case to this short question, whether every man, who finds the property of another, which happens to have been lost or mislaid, and voluntarily puts himself to some trouble and expense to preserve the thing, and to find out the owner, has a lien upon it for the casual, fluctuating, and uncertain amount of the recompense, which he may reasonably deserve? It is enough to say, that there is no instance of such a lien having been claimed and allowed. The case of a pointer dog was a case in which it was claimed and disallowed, and it was thought too clear a case to bear an argument. Principles of public policy and commercial necessity support the lien in case of salvage. Not only public policy and commercial necessity do not require that it should be established in this case, but very great inconvenience may be apprehended from it, if it were to be established. The owners of this kind of property, and the owners of craft upon the river, which lie in many places moored together in large numbers, would not only have common accidents from carelessness of their servants to guard against, but also the wilful attempts of ill-designing people to turn their floats and vessels adrift, in order that they might be paid for finding them. I mentioned, in the course of the cause, another great inconvenience, namely, the situation in which an owner, seeking to recover his property in an action of trover, will be placed, if he is, at his peril, to make a tender of a sufficient recompense, before he brings his action; such an owner must always pay too much, because he has no means of knowing exactly how much he ought to pay, and because he must tender enough. I know there are cases, in which the owner of property must submit to this inconvenience; but the number of them ought not to be increased. Perhaps it is better for the public, that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude. But, at any rate, it is fitting that he who claims the reward in such case should take upon himself the burden of proving the nature of the service which he has

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[1] Pothier, Traité de Dépôt, n. 69, 72, 74, 78.

ward to any finder of the property who shall restore it, that will give the finder a lien for the amount of the reward.[1] [Although it has been held otherwise if the reward is merely "liberal," not naming any particular sum.[2]]

§ 122. If the depositary improperly refuses to redeliver the deposit, when it is demanded, he henceforth holds it at his own peril. If, therefore, it is afterwards lost, either by his neglect, or by accident, it is his own loss; for he is answerable for all defaults and risks in such cases.[3] It is said, indeed, in the civil law, that if the thing afterwards perishes from its own inherent defect, without any accident, and it would have perished, although it had been restored to the depositor, such a loss, not being the effect of the delay, is not at the risk of the depositary.[4] If such a case can exist, and be made entirely certain, it must be a case of a very rare and extraordinary nature; and any attempt to get rid of a loss on such a ground, ought to be watched with great suspicion. Our law has not, as yet, recognized any such distinction; and, as the non-delivery after such a demand is a tortious conversion, it seems difficult to see how it could be maintained. So, if the depositary should make a sale of the goods bailed, that would, *à fortiori*, be a conversion.[5]

§ 123. And not only is the depositary, who is in default (*in mora*, as it is called in the civil law), liable for all losses, but the civil law imposes upon him the duty of paying interest, or of making other compensation for the use of it.[6] And this is

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performed, and the quantum of the recompense which he demands, instead of throwing it upon the owner to estimate it for him, at the hazard of being nonsuited in an action of trover." See Baker *v.* Hoag, 3 Barbour, 203; 7 Id. 113; Ante, § 44 a, 83 a; Wentworth *v.* Day, 3 Metc. R. 352.

[1] Wentworth *v.* Day, 3 Metc. R. 352.

[2] Wilson *v.* Guyton, 8 Gill, 213.

[3] Jones on Bailm. 70 to 121; Dane, Abridg. ch. 17, art. 14; Pothier, Traité de Dépôt, n. 33; Ante, § 100; Holbrook *v.* Wight, 24 Wend. R. 169. See Post, § 414.

[4] Dig. Lib. 16, tit. 3, l. 22, § 3, l. 14, § 2.

[5] See Sargent *v.* Gile, 8 N. H. Rep. 325; Stanley *v.* Gaylord, 1 Cushing, 536.

[6] Ayliffe, Pand. B. 4, tit. 17, p. 523; Code of Louisiana (1825), art. 2929.

done with great justice. Our law would doubtless allow a like compensation in the shape of damages, where the circumstances of the case should call for any thing more than a simple indemnity for the direct loss.

§ 124. There are certain cases of deposits made by public officers, which deserve to be brought under notice, before this subject is concluded. By the local jurisprudence of some of the New England States, and particularly of the States of Massachusetts, New Hampshire, and Maine, personal property (as well as real estate) may be attached upon mesne process, to respond the exigency of the writ, and satisfy the judgment. In such cases of attachment it is a common practice for the officer to bail the goods attached to some person, who is usually a friend of the debtor, upon an express or implied agreement on his part to have them forthcoming on demand, or in time to respond the judgment, when the execution thereon shall be issued.

§ 125. Upon bailments of this sort it may not be without use to consider what are the rights and duties of the officer or bailor, and what are the rights and duties of the bailee, commonly called the receiptor. In the first place, as to the rights and duties of the officer. The officer making an attachment on process acquires a special property in the goods attached,[1] which continues until the attachment is legally dissolved. If, during this period, his possession is violated, he may maintain all the usual remedies, such as trover, trespass, and replevin, against the wrongdoer.[2] If, upon the attachment being made, the goods are delivered into the hands of any bailee for custody, without any specific time for the return, the officer has a right to demand the possession of them at any time at his pleasure, even before any judgment or execution in the suit;[3]

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[1] Ladd *v.* North, 2 Mass. R. 514; Perley *v.* Foster, 9 Mass. R. 112; Whittier *v.* Smith, 11 Mass. R. 211; Barker *v.* Miller, 6 Johns. R. 195. See Ante, § 93 e; Post, § 620. See Pierce *v.* Strickland, U. S. Circ. Court, Maine, May term, 1842, MSS.; Ante, § 93 to 95.

[2] Ibid.; and Ludden *v.* Leavitt, 9 Mass. R. 104; Warren *v.* Leland, 9 Mass. R. 265; Gibbs *v.* Chase, 10 Mass. R. 125; Gates *v.* Gates, 15 Mass. R. 310; Brownell *v.* Manchester, 1 Pick. R. 232; Badlam *v.* Tucker, 1 Pick. R. 389. See Ante, § 93 e to 93 h.

[3] Phillips *v.* Bridge, 11 Mass. R. 242.

and upon the bailee's refusal, the officer may maintain a suit against him for the goods, and also for damages.[1] Even if no actual attachment has taken place, but the bailee has accepted the bailment, as if the goods were attached, and waived the formality of an actual attachment, the officer, if he has made return upon his precept of an attachment of the goods, is entitled, as against the bailee, to all the rights which he would have acquired by an actual attachment.[2]

§ 126. The right of the officer to have restitution of the goods against his bailee is not affected by the fact that the judgment in the suit, on which the attachment has been made, is satisfied by the debtor, if the officer still remains liable to the debtor for the goods, or to any subsequent attaching creditor.[3] But in case the officer is discharged from all liability over to any person, his right to maintain an action is gone, and the bailee will be discharged from his obligation to the officer.[4]

§ 127. If the bailee has actually delivered over the goods to the debtor, the officer may, at any time during the continuance of the attachment, retake them from the possession of the debtor; for his special property continues, notwithstanding such bailment and delivery over.[5]

§ 128. The officer, who has made an attachment upon goods, is considered as having the custody thereof as long as the attachment continues; and if he delivers them over to the bailee, or to the debtor, and a loss ensues, he will be liable to the creditor, and the loss of the property is at his own peril.[6]

§ 129. The creditor in the suit has no property or interest whatsoever in the goods attached; and can maintain no action for any wrong or injury done to them by any person who takes them or injures them, while in possession of the officer.[7] His

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[1] Phillips *v.* Bridge, 11 Mass. R. 242.

[2] Jewett *v.* Torrey, 11 Mass. R. 219; Lyman *v.* Lyman, 11 Mass. R. 317; Bridge *v.* Wyman, 14 Mass. R. 190.

[3] Jenney *v.* Rodman, 16 Mass. R. 464; Whittier *v.* Smith, 11 Mass. R. 211; Knap *v.* Sprague, 9 Mass. R. 258; Jewett *v.* Torrey, 11 Mass. R. 219.

[4] Lyman *v.* Lyman, 11 Mass. R. 317; Jenney *v.* Rodman, 16 Mass. R. 464.

[5] Bond *v.* Padelford, 13 Mass. R. 394.

[6] Phillips *v.* Bridge, 11 Mass. R. 242; Tyler *v.* Ulmer, 12 Mass. R. 163; Congdon *v.* Cooper, 15 Mass. R. 10.

[7] Ladd *v.* North, 2 Mass. R. 514; Ante, § 93 to 95.

sole remedy is against the officer. The officer is not bound to deliver up the goods to the creditor, who has obtained judgment and execution, that they may be levied on by another officer; for he is still accountable to the debtor for them.[1] And, notwithstanding any delivery of the goods to a bailee, the officer may attach them upon any subsequent process coming into his own hands, while they remain in the hands of his bailee, and the bailee will be responsible for the goods; and it will furnish no defence to the latter, that he has subsequently delivered them up to the debtor.[2]

§ 130. The officer, then, being responsible over to the debtor for a due redelivery of the property attached, in case of the dissolution of the attachment, or a satisfaction of the creditor's claim in any way whatsoever, it behooves him to take care that he does not put it in jeopardy by any act of his own. If it is lost by his negligence he will be responsible therefor.[3] But what degree of negligence will make him responsible does not seem to have been directly decided. He would, doubtless, be responsible for gross negligence and fraud; but whether he would be responsible for ordinary negligence, does not appear to have been decided by any adjudged case;[4] although, as he is a bailee for a compensation, it may be thought that he ought to be bound by the common rule in such cases to ordinary diligence.[5]

§ 131. In cases of such attachment of property, the question has often arisen, how and by whom the officer is to be indemnified for the expenses of keeping the property. If, for instance, by direction of the creditor, he attaches cattle, who is to discharge the necessary expenses of their maintenance? There were formerly many doubts on the subject. The rule, as now settled, is, that the debtor, whose cattle are attached, is

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[1] Blake *v.* Shaw, 7 Mass. R. 505; Badlam *v.* Tucker, 1 Pick. R. 389.

[2] Whittier *v.* Smith, 11 Mass. R. 211; Knap *v.* Sprague, 9 Mass. R. 238; Jewett *v.* Torrey, 11 Mass. R. 219; Lyman *v.* Lyman, 11 Mass. R. 317.

[3] See Jenner *v.* Joliffe, 6 Johns. R. 9.

[4] See Burke *v.* Trevitt, 1 Mason, R. 96, 100 to 102; Browning *v.* Hanford, 5 Hill, 592; Ante, § 46.

[5] See Pothier, Traité de Dépôt, n. 91, 92, 96; Post, § 620.

bound, at his own risk and peril, to provide suitable food for them, and if they perish through the want of it, it is his exclusive loss.[1] But the officer is bound, if the debtor neglects it, to provide suitable food; and if he does, and a recovery is had against the debtor, the expenses are a charge upon the property in the officer's hands, and may be deducted by him from the proceeds of the sale on the execution.[2] If no recovery is had in the suit against the debtor, then the officer is entitled to be reimbursed by the creditor, who has directed the attachment.[3] If the officer does not provide suitable food, and by his neglect the cattle perish, he will be liable to the creditor for their full value.[4]

§ 132. In the next place, as to the rights and duties of the bailee of the attaching officer. His duties are sufficiently apparent, from what has been already stated under the preceding head. He is bound to keep the property, and to return it on demand to the officer, and to take reasonable care of it, while it is in his custody. For any omission of duty in any of these particulars, he will be responsible to the officer. But this obligation to return the property to the officer is not in all cases absolute. If the attachment is dissolved, and no other person has any just claim upon the property, he may, by a restitution of it to the owner, discharge himself from his obligation to the officer; for, in such a case, the special property of the officer is gone.[5] And if the officer has wrongfully attached the goods of a third person, as the property of the debtor, and has bailed them, the bailee may, by a delivery of them to the true owner, protect himself; for by such redelivery the officer will be discharged from any liability for the goods to the creditor, and the debtor, and the real owner.[6]

§ 133. The bailee has no property whatever in the goods, but has a mere naked custody.[7] And, therefore, it has been

[1] Sewall *v.* Mattoon, 9 Mass. R. 537.

[2] Tyler *v.* Ulmer, 12 Mass. R. 163, 168.

[3] Phelps *v.* Campbell, 1 Pick. R. 59, 61.

[4] Sewall *v.* Mattoon, 9 Mass. R. 537.

[5] Whittier *v.* Smith, 11 Mass. R. 211; Cooper *v.* Mowry, 16 Mass. R. 5.

[6] Learned *v.* Bryant, 13 Mass. R. 224; Ante, § 52.

[7] Norton *v.* People, 8 Cowen, R. 137; Ante, § 93 e to 93 h; Waterman *v.* Robinson, 5 Mass. R. 303, 304; Ante, § 93 to 95.

held in Massachusetts, that he cannot maintain any action for them against any one, who shall take them out of his possession.[1] But it deserves consideration, whether his possession would not be a sufficient title against a mere wrongdoer; and whether his responsibility over to the officer does not furnish a just right for him to maintain an action for injuries, to which such responsibility attaches.[2] It has, on the other hand, been decided upon full consideration in New Hampshire [and Vermont],[3] that

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[1] Ludden *v.* Leavitt, 9 Mass. R. 104; Warren *v.* Leland, 9 Mass. R. 265; Commonwealth *v.* Morse, 14 Mass. R. 217; Contrà, Waterman *v.* Robinson, 5 Mass. R. 303, 304. In this last case, the Court held that a naked bailee might maintain an action of trespass or of trover, but not of replevin, as the latter was founded in property. Ante, § 93 b to 93 h.

[2] See Ante, § 93 to 95, 153, 266, 267; Waterman *v.* Robinson, 5 Mass. R. 303.

[3] [In Thayer *v.* Hutchinson, 13 Vermont, 507, Bennett, J., said: "The opinion and charge of the county court, in this case, that the plaintiff was not entitled to recover, no doubt proceeded upon the ground that the plaintiff had no such interest in the property in question, as would enable him to maintain trover. It is true that, in Massachusetts, it has been held that the receiptor of chattels attached has but a mere *naked possession* of them, as the servant of the officer, without any legal interest, and therefore, that he cannot maintain any action against any one who shall take them out of his possession. Ludden *v.* Leavitt, 9 Mass. R. 104; Warren *v.* Leland, Id. 265; Commonwealth *v.* Morse, 14 Mass. 217. The same principle has been recognized in other cases in that State. In Dillenback *v.* Jerome *et al.* 7 Cowen, 294, the Supreme Court of New York hold the same doctrine, and fully indorse the Massachusetts cases. See also, Barker *v.* Miller, 6 Johns. 196, and People *v.* Norton, 8 Cowen, 137. The principle of these cases is directly opposed to the present action, and they are the opinions of learned and highly respectable Courts. Still we cannot accede to their soundness. The position that a mere *depositary*, or bailee for safe keeping, has no special property in the deposit, but a custody only, is certainly a doctrine which is inculcated by the most respectable authorities. In addition to the foregoing, I might refer to Hartop *v.* Hoare, 3 Atkyns, 44; Southcote's case, 4 Coke's R. 84; Waterman *v.* Robinson, 5 Mass. R. 304; Brownell *v.* Manchester, 1 Pick. 232. Still, it is often laid down, by elementary writers, that a *depositary* has a *special* property in the deposit. Blackstone, in his Commentaries, 2d vol. 452, lays it down that the general bailee may vindicate, in his own right, his *possessory interest* against any stranger or third person. Sir William Jones, in his Law of Bailments, says: 'Every bailee has a *temporary, qualified property* in the things of which possession is delivered to him, and has therefore a possessory action against a stranger who may damage or purloin them.' A case is cited from the Year Book, 21 Hen. VII., in which Justice Fineax is reported to have said: 'In this case the bailee has a property in the thing, against every stranger,

the bailee of the officer has a sufficient property to maintain an action against a stranger for any dispossession or injury

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for he is chargeable to the bailor, and for this reason he shall recover against a stranger who takes the goods out of his possession.' The character of the bailment does not distinctly appear in the report; but, from the statement of the pleadings, it is to be inferred that the bailee was a mere *depositary*. Other cases are to be found in the books, recognizing the same doctrine. But, be this as it may, I do not think it is important, in this case, to determine whether the plaintiff had strictly a *special property* in the articles in question, or not. He is answerable over to the officer for the property, and the extent of his responsibility may be immaterial; and he ought not to be chargeable without having the means of redress. The plaintiff had the lawful possession of the chattels, and whether this was accompanied with a special interest or property in them, or not, it was sufficient to enable the possessor to maintain trover or trespass against any wrongdoer who violates that possession. Fisher *v.* Cobb, 6 Vt. R. 624. The finder of a jewel has such a title to it as will enable him to keep the possession against all persons but the rightful owner, and he may maintain trover for it. Armory *v.* Delamirie, 1 Strange, 505. Sutton *v.* Buck, 2 Taunton, 302, 209, is to the same effect. Lawrence, J., in the latter case, says: 'There is enough of property in this plaintiff to enable him to maintain trover against a wrongdoer;' and Chambre, J., says: 'The plaintiff has possession under the rightful owner, and that is sufficient against a person having no color of right;' again he says: 'Even a general bailment only, for the benefit of the rightful owner, will suffice.' Burton *v.* Hughes, 2 Bingham, 173, and Oughton *v.* Seppings, 1 Barn. & Adolph. 291, are to the same effect. But it does not follow that because a depositary or bailee for safe keeping, who has the actual possession of a chattel, can maintain trover, as well as trespass, against a wrongdoer, who disturbs his possession, he must therefore have a special property in the chattel. In Waterman *v.* Robinson, 5 Mass. R. 304, which was replevin, Parsons, C. J., in giving the opinion of the court, expressly states that, as the plaintiff had merely the *care of the goods for safe keeping, and no special property in them*, he could not maintain replevin, which is founded in property either general or special, but might maintain trespass or trover, if his possession was violated. It is generally said that a sheriff, who has seized goods on an attachment, or execution, can maintain trover for them on the ground that he has a *special* property in them. In Giles *v.* Grover, 6 Bligh, R. 277, in the House of Lords this subject is fully examined. Lord Tenterden, in that case, p. 452, says: 'These actions, that is, actions by sheriffs, 'are maintainable upon a ground perfectly distinct from the right of property. They are maintainable upon the ground of possession;' and he adds: 'Any man in the possession of goods, as bailee, or otherwise, may, in his own name, maintain an action.' Lord Tindall, C. J., in the same case, says in substance: 'He who has the legal possession of goods, though not the property, may maintain trover against a wrongdoer, without color of legal title, who cannot dispute the title of the party in possession.'

of the goods attached.[1] In the French law, in cases of seizure or attachment of goods, the bailee is deemed to possess only a

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And he adds: 'It would be a better definition of the sheriff's relation to these goods, to say, "he has them in his custody under a power to sell them, rather than an *actual interest or property in them.*" They are *in custodia legis*, a phrase which plainly distinguishes a mere custody and guardianship of the goods, from a property in them.' Several of the other Judges gave the same explanation. Justice Taunton added: 'The sheriff, under the writ, has a mere power to sell, without any interest vested in him, except that which any bailee, who is answerable over, has for his own protection.' If this may be termed an interest, or a special property in the chattel, it is like the interest in the receiptman. Both are founded upon a liability over to others. It is clear there is no beneficial interest. When we speak of a special property in a chattel, we usually mean some right therein distinct and subordinate to the general owner, as in the case of a pledge. If, by a special property, we mean a subordinate right to control the chattel, arising out of a lawful possession of it, accompanied with a liability over, then it is clear the mere depositary, or bailee for safe keeping, and the sheriff, who has it *in custodia legis*, have such property. The defendants, in the case before the Court, stand as strangers, and have no color of right.

"The fact, that Kidder stated, when the defendants drove away the property, that he took it upon an attachment against Bracket, amounted to nothing. No process was shown; none given in evidence or offered on the trial. The defendants, then, must stand, not only as strangers, but even without any color of right. If, then, we were even to hold, as in Massachusetts and New York, that the receiptman had no property whatever in the chattels, for which this action was brought, but only a mere naked custody, still, his *possession* and *responsibility over* to the officer, who delivered them to him, must furnish sufficient title and just right for him to recover, as we think, against these defendants. Without this, the plaintiff may be charged for not returning the chattels to the officer, and yet be left remediless for the very injury, which may put it out of *his power* to return them. Though it may be true that the officer who served the process might have maintained the action in his own name, still, it does not follow that he *alone* can have the action. Chancellor Kent, in his Commentaries, vol. 2, p. 585, 3d edition, says: 'Notwithstanding all the nice criticism to the contrary, every bailee in lawful possession of the subject of the bailment, may justly be considered as having a *special* or *qualified property* in it, and as he is responsible to the bailor in a greater or less degree for the custody of it, he, as well as the bailor, may have an action against a third person for an injury to the chattel.' See also, 2 Kent, Com. 568; Bac. Abridg. Bailment, D.; Roberts *v.* Wyatt, 2 Taunt. 268; Rooth *v.* Wilson, 1 B. & Ald. 59; Addison *v.* Round, 4 Adol.

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[1] Poole *v.* Symonds, 1 New Hamp. R. 289; Odiorne *v.* Colley, 2 New Hamp. R. 70; Hyde *v.* Noble, 13 New Hamp. 494; Ante, § 93 e to 93 h.

naked custody. But this is true in that law also, as to the attaching officer himself, in which respect it differs from our law.[1] But, assuming that the bailee has only a naked custody in the goods, it is agreed that the bailee may retake them from the custody of the debtor, to whom he has delivered them, although he could not maintain an action for the possession of them, either against him or against a third person.[2]

§ 134. The French law upon the subject of the rights and duties of officers attaching property under judicial process, and their bailees, is entitled to the attention of every lawyer, who is ambitious of acquiring a rational view of the subject.[3] The general obligation in that law is understood to be for ordinary diligence on the part of the officer.[4] But a detail of all the rights and duties springing out of such attachments under that law would lead us too far into collateral inquiries.[5]

& Ellis, 799, 804; Nicolls *v.* Bastard, 2 Cromp. Mees. & Rosc. R. 657, 660, 661. In the case of Burrows *v.* Stoddard, 3 Conn. R. 160, it was expressly held that the receiptor of goods attached, who had put them into the actual possession of a third person to take the charge of them, might maintain trespass, even against a person who had attached the goods as the property of the same debtor. Such third person was regarded as the mere servant of the receiptor. This same question has received very full consideration by the Supreme Court of New Hampshire, in the case of Poole *v.* Symonds, 1 N. H. R. 290, where it is held that the receiptor may well have the action. The defendant, another deputy sheriff, in that case, too, had attached the property for another creditor as belonging to the same debtor, and was not, of course, without some color of right. The Court say, that the receiptor acquired a special property in the goods, subordinate to and consistent with the special property of the officer; and that it is not at all inconsistent that two persons should severally have a special property in the chattel, at one and the same time.

"We have been led to a more full examination of this question, in consequence of the opposing decisions in Massachusetts and New York, than we should otherwise have thought necessary. We cannot, however, subscribe to the correctness of their doctrine; and we think, upon well-established principles, the plaintiff had, at least, in the language of Sir William Blackstone, 'such *possessory interest*,' in the chattels in question, as was sufficient to entitle him to maintain this action."]

[1] Pothier, Traité de Dépôt, n. 91, 92, 93, 99.

[2] Bond *v.* Padelford, 13 Mass. R. 394.

[3] Pothier, Traité de Dépôt, n. 91 to 98.

[4] Pothier, Traité de Dépôt, n. 92.

[5] Pothier, Traité de Dépôt, n. 91 to 98.

§ 135. It has been said, that by an attachment the general property of the debtor is in abeyance and suspended.[1] This proposition, however, is to be received with some qualifications. The debtor, during the existence of the attachment, is doubtless barred of any right to recover the same against the officer. But, subject to the lien of the attachment, he retains the right to the property, and may alienate the same; and his vendee, upon discharging the attachment, or satisfying the debt, will be entitled to receive the same from the person in whose custody it is.[2]

§ 136. Here we finish the consideration of the subject of deposits; a title which has employed the learning and exercised the ingenuity of some of the proudest names in the annals of jurisprudence.

CHAPTER III.

ON MANDATES.

§ 137. We come next to the consideration of the contract which in the civil law is called *Mandatum*, and which Sir William Jones, for want of a more appropriate English word, has not scrupled to call a Mandate. We are accustomed, indeed, in common parlance, to use this word in the sense of a judicial command or precept, which, however, he deems only a secondary and inaccurate use of it.[3] And he defines a mandate to be a bailment of goods without reward, to be carried from place to place, or to have some act performed about them.[4]

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[1] Ladd *v.* North, 2 Mass. R. 514; 1 Domat, B. 1, tit. 7, § 4.

[2] See the reasoning in Bigelow *v.* Willson, 1 Pick. R. 485. See also, Pothier, Traité de Dépôt, n. 93.

[3] Jones on Bailm. 52.

[4] Jones on Bailm. 117.

In this definition, he seems mainly to have followed that of Lord Holt, in Coggs *v.* Bernard,[1] whose language is, that it is a delivery of goods or chattels to somebody, who is to carry them, or to do some act about them gratis, without any reward for such work or carriage. Perhaps this is more properly an enumeration of the various sorts of mandates, than a strict definition of the contract. At least, it may be more simply stated to be, at the common law, a bailment of personal property, in regard to which the bailee engages to do some act without reward. Pothier has defined it according to the civil law, thus: "*Mandatum est contractus, quo quis negotium gerendum, comittit alicui, gratis illud suscipienti, animo invicem contrahendæ obligationis.*"[2] Wood defines it to be a contract of the law of nations, by which an affair is committed to the management of another, and by him undertaken to be performed gratuitously.[3] This is substantially the definition of Pothier, who adds only, that it is to be done at the risk and in the place of the bailor, and that the bailee is to render to him an account.[4] Dr. Halifax says: "A mandate, or commission, is a contract, by which a lawful business is committed to the management of another, and by him undertaken to be performed without reward."[5] The Code of France declares that a mandate, or procuration, is an act by which one gives to another a power of doing something for the mandant, and in his name.[6] Heineccius gives a still more concise definition: *Mandatum* (*a manûs datione dictum*),[7] *quod est contractus consensualis, bonæ fidei quo alteri negotium, gratis gerendum, com-*

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[1] 2 Ld. Raym. 909, 913.

[2] Pothier, Pand. Lib. 17, tit. 1, n. 1; Dig. Lib. 17, tit. 1, l. 1, § 4; Cod. Lib. 4, tit. 35; Inst. Lib. 3, tit. 27; Ayliffe, Pand. B. 4, tit. 10, p. 476; Story on Agency, § 4.

[3] Wood, Civ. Law, B. 3, ch. 5, p. 242.

[4] Pothier, Traité de Mandat, Art. Prelim. n. 1.

[5] Halifax, Analysis of the Civ. Law, 70. See Ayliffe, Pand. B. 4, tit. 10, p. 476, 477.

[6] Code Civil of France, B. 3, tit. 13, ch. 1, art. 1984; Merlin, Repert. Mandat, § 1, Art. Prelim.; Code of Louisiana (1825), art. 2954.

[7] Noodt gives a similar derivation. See also, Pothier, Contrat de Mandat, Art. Prelim.; Ayliffe, Pand. B. 4, tit. 10, p. 476.

mittitur, et ab altero suscipitur.[1] Erskine defines it to be that contract by which one employs his friend to manage his affairs, or any branch of them.[2] In the choice of definitions, none strikes my mind to be more neat and distinct, than that of Mr. Chancellor Kent. "A mandate," says he, "is when one undertakes, without recompense, to do some act for another, in respect to the thing bailed."[3]

§ 138. But, not to dwell further upon mere definitions, the person employing is called in the civil law *mandans* or *mandator* (and hence, in the Scotch and French law he is called *mandant*);[4] and the person employed is called *mandatarius.* I shall not scruple to call the former, for want of a more appropriate word, the mandator;[5] and usage has already sanctioned the propriety of calling the latter the mandatary.[6]

§ 139. From the language of Dr. Halifax, it would seem that he supposed that the contract of mandate was not recognized in the common law. His words are, "In the laws of England the contract of *mandatum* is of no use;"[7] in which assertion, he is under an entire mistake. The common law may not, and, indeed, does not, comprehend, under that appellation, all the contracts of mandate according to the civil law; such, for example, as mere naked acts of agency, where there is no bailment of any thing to the agent.[8] But, for the most part, the principles applicable to all the various classes of mandates have a place in our law, although they may be differently arranged, and may have acquired a different appellation from that which is recognized in the civil law.[9]

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[1] Heinec. ad Pand. Pars 3, Lib. 17, § 230. See Vinn. ad Inst. p. 684; Partidas, B. 5, tit. 12, l. 20, &c.; 1 Bell, Comm. 259, 5th edit.

[2] Ersk. Inst. B. 3, tit. 3, § 11.

[3] 2 Kent, Comm. Lect. 40, p. 568, 4th edit.

[4] Ersk. Inst. B. 3, tit. 3, § 11; Pothier, Traité de Mandat, n. 1.

[5] 1 Brown, Civ. Law, 382; Halifax, Anal. of Civ. Law, 70.

[6] Jones on Bailm. 63. In the French law, the former is called Le Mandant, the latter, Le Mandataire, or Procureur. Pothier, Traité de Mandat, Art. Prelim. n. 1. Dr. Halifax calls the former Mandator, the latter, Mandatee. I should have followed him, if Mandatary had not been already naturalized. Halifax, Anal. of Civ. Law, 70, § 16, 17.

[7] Halifax, Anal. of Civ. Law, 70, § 16, 18, 19.

[8] Post, § 142.

[9] See Story on Agency, § 4.

§ 140. The contract of mandate seems so nearly allied to that of deposit, that it may properly be deemed to belong to the same class. The great distinction between one sort of mandate and a deposit is said by Sir Wm. Jones to be, that the former lies in feasance, and the latter simply in custody.[1] Philosophically, or even technically speaking, it may be doubted whether this distinction really exists. In cases of deposit, something almost always remains to be done, besides a mere passive custody. If the deposit is perishable, labor must be performed to keep it in proper order. If it is a living animal, as a horse, suitable food and exercise must be given to it. And these may properly be said to lie in feasance. In the next place, in mandates there is commonly custody; the possession of the thing being generally indispensable to the performance of the act intended by the parties. So that, in each contract, there is custody, and labor, and service to be performed. The true distinction between them is, that, in the case of a deposit, the principal object of the parties is the custody of the thing, and the service and labor are merely accessorial; in the case of a mandate, the labor and services are the principal objects of the parties, and the thing is merely accessorial. The distribution of the subject into different heads may, on this account, be not unjustifiable, and it is certainly convenient.

§ 141. The contract of mandate, in our law, is (as the common definition imports) confined to mere personal property; and does not embrace, as it does in the civil law, real property. In general, the civil law makes few distinctions of rights, and duties, and remedies between the one species of property and the other. In our law the distinctions are very broad and important in many respects. There is certainly no repugnance to any principle of our law, in considering a gratuitous contract to do an act in respect to real property to be a mandate. It may involve obligations precisely the same as it would in relation to personal property. But the definition of Sir William Jones, above stated, as well as the description of this sort of bailment by Lord Holt in Coggs *v.*

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[1] Jones on Bailm. 53.

Bernard, in which he constantly speaks of goods and chattels,[1] abundantly shows the habit of our law to be, to confine bailments to personal property. In the civil law a gratuitous engagement to clear out a ditch, or to cultivate or to sell a farm, belonging to the person giving the direction, would be deemed a mandate.[2] In our law it would be treated merely as a special undertaking, without falling under that class of contracts.

§ 142. In the civil law the contract of mandate might also intervene, although there was no delivery of property in the mandator. The French law and the law of Louisiana adopt the same interpretation.[3] Thus, every case of a gratuitous agency or procuration gave rise to the obligations of a mandate in the civil law. As if A requested B to purchase a farm for him, or to buy stock, or to build a boat, or to write a deed or other instrument, without any recompense, express or implied, it was deemed a mandate.[4] In our law we should treat it as a case of agency, and not of bailment.[5] The obligations in point of law may, in many respects, be the same; but the classification would be different.[6]

§ 143. It has been observed, according to the known distinctions in the foreign and Roman law, that the contract of mandate is one of the law of nations (that is, one arising from the law of nature, common to nations); that it is founded upon mere consent, express or implied; that it is a contract of mere kindness and beneficence; and that it belongs to the class called synallagmatical, that is, involving mutual

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[1] Ld. Raym. 909, 913, 918. See also, Jones on Bailm. 1, 117; Bac. Abr. *Bailment.*

[2] 1 Pothier, Pand. Lib. 17, tit. 1, n. 3, 4, 5; Dig. Lib. 17, tit. 1, l. 2; 1 Brown, Civ. Law, 381.

[3] Pothier, Contrat de Mandat, n. 1; Code Civil of France, art. 1984 to 1991; Code of Louisiana (1825), art. 2954 to 2964.

[4] 1 Domat, B. 1, tit. 15, § 1; Wood, Civ. Law, 242; 1 Pothier, Pand. Lib. 17, tit. 1, n. 3, 5; Pothier, Contrat de Mandat, ch. 1, n. 1, 6, 7; Gaius, Institutes, Lib. 3, § 155 to 161; 1 Brown, Civ. Law, 381; Ayliffe, Pand. B. 4, tit. 10, p. 476.

[5] Story on Agency, § 4.

[6] Ibid.

and reciprocal obligations.[1] But these distinctions are not material to be considered in our law.

§ 144. From the very terms of the definition, three things are necessary to create a mandate. First, that there should exist something, which should be the subject-matter of the contract, or some act or business to be done; *Ut sit negotium, quod gerendum alter committat, alter suscipiat;*[2] secondly, that it should be to be done gratuitously;[3] and thirdly, that the parties should voluntarily intend to enter into the contract.[4]

§ 145. In the first place, as to the matter of the contract. It must respect an act to be done *in futuro*, and not one already completed; *ut sit gerendum, non jam gestum.*[5] Thus, it is said, that if A requests B to lend C at his, A's risk, a sum of money, and he lends it accordingly, it is properly a mandate, and A is responsible accordingly. But if unknown to A, B has already lent C the sum, there the like contract does not arise.[6] So says the Roman law, *Si post creditam pecuniam mandavero creditori credendam, nullum esse mandatum.*[7] And the Roman law would also class under the head of a mandate a request from a third person to a creditor to give time to his debtor, at the risk of the mandator.[8]

§ 146. It must also respect some certain thing; for if the thing be wholly uncertain, it is impossible that any contract can arise. The very vagueness of it prevents the law from acting upon it.[9] Thus, in the French law, an example of a void man-

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[1] Pothier, Contrat de Mandat, ch. 1, n. 1 to 5; Vinn. ad Inst. de Mandat. Lib. 3, tit. 27.

[2] Pothier, Pand. Lib. 17, tit. 1, n. 1, Art. Prelim.; Pothier, Contrat de Mandat, n. 6.

[3] Pothier, Pand. Lib. 17, tit. 1, n. 1, Art. Prelim.; Id. n. 15; Pothier, Contrat de Mandat, n. 18.

[4] Pothier, Pand. Lib. 17, tit. 1, n. 1; Pothier, Contrat de Mandat, n. 5, 6, 9, 17, 22.

[5] Pothier, Pand. Lib. 17, tit. 1, n. 1, Art. Prelim.; Pothier, Contrat de Mandat, n. 6.

[6] Pothier, Contrat de Mandat, n. 6.

[7] Ibid.; Dig. Lib. 17, l. 12, § 14; Pothier, Pand. Lib. 17, tit. 1, n. 2.

[8] Pothier, Contrat de Mandat, n. 6; Dig. Lib. 17, l. 12, § 14.

[9] Pothier, Contrat de Mandat, n. 9.

date would be, where A charged B to buy something for him on a particular evening, or at a particular fair. There, as it is wholly uncertain what he is to buy, no contract arises.[1] An example in our law would be, where A requested B to take something for him to carry to C, and nothing was ever delivered, or designated to B, to be carried.

§ 147. It must also be an act of such a nature, that it may properly be deemed the act of the mandator, through the instrumentality of the mandatary, or his agent, according to the maxim, *Qui mandat, ipse fecisse videtur.*[2] Thus, if A directs B to borrow a sum of money from his banker, belonging to A, as a gratuitous loan, and B receives it as such, it is plain that it is not a mandate, but a mere loan; for A cannot lend to himself.[3] This case may seem too clear for controversy; but the civil law has thought it important enough for a place in its text. *Si quis Titio mandaverit, ut ab actoribus suis mutuam pecuniam acciperet, mandati eum non acturum.*[4]

§ 148. So, the act to be done must be of a nature capable of being done, and not be a vain or absurd act.[5] A cannot create a contract of mandate with B by requesting B to buy for him his, A's goods, for A cannot buy of himself; nor to buy B's goods, for B cannot buy of himself.[6] But if the act be possible, the contract may arise, although the mandatary may not have the proper skill or power to perform it well; for there is no absurdity in his undertaking it; for in such a case the maxim applies, *Spopondit peritiam et industriam negotio gerendo parem.*[7]

§ 149. If the thing to be done concerns only the interest of the mandatary, it is equally plain that no contract arises.[8] As

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[1] Pothier, Contrat de Mandat, n. 9.

[2] Id. n. 10.

[3] Id. n. 10.

[4] Id. n. 10; Pothier, Pand. Lib. 17, tit. 1, n. 5, 50.

[5] Pothier, Contrat de Mandat, n. 12.

[6] Pothier, Pand. Lib. 17, tit. 1, n. 6, 10, 11; Pothier, Contrat de Mandat, n. 14.

[7] Pothier, Contrat de Mandat, n. 13, 14; Pothier, Pand. Lib. 17, tit. 1, n. 25 to 30.

[8] Pothier, Contrat de Mandat, n. 15; 1 Stair, Inst. B. 1, tit. 12, § 1; Ersk Inst. B. 3, tit. 3, § 13.

if I direct A to invest his money in a particular fund, it is but mere advice or recommendation.[1] *Si tuâ tantum gratiâ tibi mandem, supervacuum est mandatum, et ob id nulla ex eo obligatio nascitur.*[2] But if it concerns the interest of the mandator as well as the interest of the mandatary, or another, the contract may arise; for there is nothing inconsistent, in such a case, in the mandatary undertaking to act for the mandator in respect to his interest. Therefore, it is said, in the civil law: *Mandatum inter nos contrahitur, sive meâ tantum gratiâ tibi mandem, sive alienâ tantum, sive meâ et alienâ, sive meâ et tuâ sive tuâ et alienâ.*[3]

§ 150. In general, a mandatary cannot, according to the principles already stated,[4] be said to have any special property in the thing, unless he has incurred expenses about it, for which he has a lien. In this respect he stands in the same situation as a depositary.[5] But, although neither of them has a special property in the thing bailed, it does not follow, that they may not have an action for any tort done to the thing while in their possession, especially if they are liable over to the bailor in such a case.[6] Indeed, as we have already seen, a depositary

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[1] Pothier, Contrat de Mandat, n. 15; 1 Domat, B. 1, tit. 15, § 1, art. 13; 1 Stair, Inst. B. 1, tit. 12, § 2; Ersk. Inst. B. 3, tit. 3, § 13.

[2] Dig. Lib. 17, tit. 1, l. 2; Id. § 6; Pothier, Contrat de Mandat, n. 15.

[3] Pothier, Contrat de Mandat, n. 15; Id. n. 17; Dig. Lib. 17, tit. 1, l. 2, § 1 to 6; Pothier, Pand. Lib. 17, tit. 1, n. 11 to 14; Wood, Civ. Law, 242; 1 Domat, B. 1, tit. 15, § 1, art. 10 to 12; Halifax, Anal. Civ. Law, 70. See Post, § 216. The Code of Louisiana of 1825, art. 2955, says: "The mandate may take place in five different manners; for the interest of the person granting it alone; for the joint interest of both parties; for the interest of a third person; for the interest of such third person, and that of the party granting it; and finally, for the interest of the mandatary and a third person." This embraces the exact divisions of the Roman law.

[4] Ante, § 93 to 93 h; Post, § 279.

[5] Ante, § 93 to 93 h.

[6] Rooth *v.* Wilson, 1 Barn. & Ald. 59; Coggs *v.* Bernard, 2 Ld. Raym. 909, 911; Pothier, Pand. Lib. 17, tit. 1, n. 30. But see Jones on Bailm. 80; Miles *v.* Cattle, 1 Lloyd & Wels. 353; s. c. 6 Bing. R. 743; Giles *v.* Grover, 6 Bligh, R. N. S. 473. See also, Burton *v.* Hughes, 2 Bing. R. 173; Sutton *v.* Buck, 2 Taunt. 302; Ante, § 93 c to 93 h; Post, § 152.

has such a right of action, flowing from his possessory title; and the same rule applies to a mandatary.[1]

§ 151. But it may be asked, whether it is necessary, that the act done should be for the benefit of the mandator, or whether he must have a right or interest in the thing itself. Pothier has answered this question in the negative. If the act to be done at the request of the mandator be for the benefit of a third person, and the mandator might himself become liable if it were not done, then the mandatary would be chargeable upon his undertaking.[2] But if the mandator acts simply as an agent in giving the mandate, and incurs no personal responsibility, or merely gives an honest recommendation to do an act, and not an order,[3] it would be otherwise. In the Roman law, the rule is, that no one can contract, except for his own interest; *Nemo stipulari potest, nisi quod suâ interest.*[4] But the same law says: *Si tibi mandavero, quod meâ non intererat, veluti ut pro Sejo intervenias, vel ut Titio credas, erit mihi tecum actio mandati; et ego tibi sum obligatus.*[5] And Pothier understands this doctrine to rest on the distinction above suggested.[6]

§ 152. The common law has not generally been supposed to be different. And where a mandatary delivers goods to another person, and they receive an injury, for which the mandatary would be liable over to the owner, there does not seem to be any objection, upon principle, to his right to recover for his own indemnity. At least, there are analogous cases, which approach very near to this doctrine,[7] even if others should be

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[1] Nicolls *v.* Bastard, 2 Cromp. Mees. & Rosc. 659, 660; Ante, § 93 c to 93 h; Post, § 152.

[2] Pothier, Contrat de Mandat, n. 17; Pothier on Oblig. n. 138, 139.

[3] Pothier, Pand. Lib. 17, tit. 1, n. 17; 1 Domat, B. 1, tit. 15, § 1, art. 13; Pothier, Contrat de Mandat, n. 18 to 21; Dig. Lib. 17, tit. 1, l. 12, § 12.

[4] Pothier, Contrat de Mandat, n. 17.

[5] Dig. Lib. 17, tit. 1, l. 6, § 4; Pothier, Pand. Lib. 17, tit. 1, n. 13; Pothier, Contrat de Mandat, n. 17.

[6] Pothier, Contrat de Mandat, n. 17; Dig. Lib. 17, l. 6, § 4; Id. Lib. 3, tit. 5, l. 21, § 3; Wood, Civ. Law, 242; 1 Domat, Civ. Law, B. 1, tit. 15, § 1, art. 11, 12; Halifax, Anal. Civ. Law, 70; Ayliffe, Pand. B. 4, tit. 10, p. 477; Pothier, Pand. Lib. 17, tit. 1, n. 30.

[7] Bac. Abridg. *Bailment*, D.; Id. *Trover*, C.; 2 Kent, Comm. Lect. 40, p.

thought to question it. The ground of the doctrine has been before alluded to. The general principle of the common law is, that possession with an assertion of right, and in many cases possession alone, is a sufficient title to enable the possessor to maintain a suit against a mere wrongdoer for any wrong or injury done to the thing.[1] However, in Miles *v.* Cattle[2] (which has been already cited in another place),[3] this rule seems not to have been deemed applicable to the case of a mandatary, who had disobeyed the directions, under which a parcel had been intrusted to him, and thereby had made himself personally responsible to the owner; first, because he had no special property in the parcel, which was delivered to him for a particular purpose, which he had disobeyed; and secondly, because by that act he had deprived the defendants of the intended hire for the carriage of the parcel. Whether this case can be distinguished in principle from other decisions, which have been made in cases of deposits and gratuitous loans,[4] and whether, if so distinguishable, it stands upon satisfactory reasoning, and just analogies of the law, are points which deserve the consideration of those who shall hereafter be called upon to administer this branch of the law. It is clear that the plaintiff in this case, by his own misconduct, had rendered himself liable to the owner for the full value of the parcel; and indeed, in a legal sense, he had converted it to his own use. Why, under such circumstances, he should not be entitled to an action against mere wrongdoers, or his own bailees, for their tort or negligence in regard to the parcel, it is somewhat difficult to perceive. Is the principle, that a bailee whether he is so by right or by wrong, may protect his possession against a wrongdoer? Or is he protected only when he is a bailee by right?[5]

565, 585, 4th edit.; Rooth *v.* Wilson, 1 Barn. & Ald. 59; 2 Ld. Raym. 909, 911.

[1] Ante, § 93 a to 93 h; Ante, § 150.

[2] 1 Lloyd & Welsby, R. 353; s. c. 6 Bing. R. 740, 743.

[3] Ante, § 93 e, note (5).

[4] 2 Saund. R. 47 b, Williams's note; Sutton *v.* Buck, 2 Taunt. R. 302; Armory *v.* Delamirie, 1 Str. R. 505; Burton *v.* Hughes, 2 Bing. R. 173; Hurd *v.* West, 7 Cowen, R. 752; Ante, § 93 to 93 g; Post, § 230, 279, 280.

[5] See Giles *v.* Grover, 6 Bligh, R. N. S. 412, 453.

§ 153. Secondly. The contract must be gratuitous. And this is the very essence of the contract; for if any compensation is to be paid, it passes into another contract, that is to say, the contract of hire. *Mandatum, nisi gratuitum, nullum est.*[1] And it matters not, in this particular, whether the compensation is express or implied; whether it is certain or uncertain in amount.[2] If, however, there is a mere honorary payment, not as a compensation, but as a mark of respect and favor, this will leave it still a mandate. So says Ulpian: *Si remunerandi gratiâ honor intervenet, erit mandati actio.*[3] Thus, if a client, upon employing an advocate in his cause, promises to give him *ex honore* a valuable book, it does not change the contract from that of a mandate to a hiring of services; for it is not understood between the parties as a compensation for services.[4] In England, counsel are understood not to be at liberty to make any pecuniary charge for their services in arguing a cause, or for advice; and they cannot recover in a suit for such services. The compensation given to them is therefore deemed a gratuity, *quiddam honorarium.* And their employment in the civil law would be called a mandate.[5] But it is different in respect to attorneys. They are entitled to compensation, and, therefore, are strictly engaged under a contract for hire. In America, counsel, as well as attorneys may maintain a suit for their fees.

§ 154. But, although a mandatary, as such, is not entitled to any compensation for his services, his actual disbursements and expenses about the thing may, nevertheless, be recoverable.[6] This is naturally implied in the undertaking; because a gratuitous act would otherwise become a burden.

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[1] Dig. Lib. 17, tit. 1, l. 1, § 4; Pothier, Pand. Lib. 17, tit. 1, n. 15; Pothier, Contrat de Mandat, n. 22; 1 Stair, Inst. B. 1, tit. 12, § 5.

[2] Pothier, Contrat de Mandat, n. 24 to 26.

[3] Pothier, Contrat de Mandat, n. 22, 23; Pothier, Pand. Lib. 17, tit. 1, n. 15, 16; Dig. Lib. 17, tit, 1, l. 1, § 4; Id. l. 6; 1 Domat, B. 1, tit. 15, art. 1, 9; Ayliffe, Pand. B. 1, tit. 10, p. 477.

[4] Pothier, Contrat de Mandat, n. 23, 24.

[5] Pothier, Pand. Lib. 17, tit. 1, n. 15; Dig. Lib. 17, tit. 1, l. 6; Pothier, Contrat de Mandat, n. 23.

[6] Pothier, Contrat de Mandat, n. 68 to 78.

§ 155. Thirdly. There must be a voluntary intention on the part of both parties to enter into the contract.[1] If there be any constraint or duress, any substantial mistake, any fraud or imposition, any misconception of the real intention on either side, the contract does not arise.[2] Thus, in the Roman law, a mere recommendation, and so *bonâ fide* intended, cannot amount to a mandate.[3] But care must be taken, in using language, that a contract of mandate be not implied from the purport of the expressions. For, if the language would naturally, even though unintentionally, create on the other side a belief that the party designed to raise a contract of mandate, and not to give a mere recommendation, the Roman law would deem it to be at the risk of the party using it, and as operating as an imposition upon the other party.[4] But, with the exception above stated, mere advice will not create the obligation of a mandate, according to the known maxim, *Nemo ex consilio obligatur*.[5] However, if there is any fraud intervening there, a right of action may arise for any injury, although the contract of mandate may not strictly take effect. The general rule of the Roman law is, *Consilii non fraudulenti nulla obligatio;* however indiscreet the advice may be.[6] The exception is, where there is fraud or bad faith; *Cæterum, si dolus et calliditas intercessit, de dolo actio competit.*[7]

§ 156. The common law would not treat these as cases of mandates, but as cases of guaranty or fraudulent representation; and would administer a remedy accordingly.[8]

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[1] Pothier, Pand. Lib. 17, tit. 1, n. 17, 18; Pothier, Contrat de Mandat, n. 18, 19, 20; 1 Stair, Inst. B. 1, tit. 12, § 3.

[2] Ante, § 59.

[3] Pothier, Pand. Lib. 17, tit. 1, n. 17, 18; Pothier, Contrat de Mandat, n. 18, 19, 20.

[4] Ayliffe, Pand. B. 4, tit. 10, p. 477, 478.

[5] Dig. Lib. 17, tit. 1, l. 2, § 6; Pothier, Pand. Lib. 17, tit. 1, n. 12; Pothier, Contrat de Mandat, n. 20, 21.

[6] Dig. Lib. 50, tit. 17, l. 47; Pothier, Contrat de Mandat, n. 20, 21.

[7] Pothier, Contrat de Mandat, n. 18 to 21; Dig. Lib. 50, tit. 17, l. 47; Wood, Civ. Law, 243; 1 Domat, B. 1, tit. 15, § 1, art. 13; Pothier, Pand. Lib. 17, tit. 1, n. 17, 18; Ayliffe, Pand. B. 4, tit. 10, p. 477; Russell *v.* Clarke, 7 Cranch, 69. See Fell on Guaranty, passim.

[8] Russell *v.* Clark's Executors, 7 Cranch, 69; Pasley *v.* Freeman, 3 Term

§ 157. But the common law follows the civil law in the other particulars, and would deem the contract of mandate, properly so called, void, where there was a substantial mistake, or fraud, or imposition practised by one party on the other; as if an article were left without any express or implied assent of the mandatary to perform the act. A case affording a striking analogy, although not a mandate, has been decided. A lent a picture to B who wished to show it to C; B, without any communication with, and unknown to C, sent the picture to C's house, where it was accidentally injured; it was held, that C was not liable for not keeping the picture safely, inasmuch as he had not voluntarily entered into any engagement to receive the picture.[1]

§ 158. Fourthly. In mandates, as in other species of contracts, it is indispensable that the act to be done should be lawful, and not against sound morals.[2] This is a principle of universal justice, and is as fully recognized in the civil law as in ours; *Rei turpis* (says the former), *nullum mandatum est.*[3] It matters not whether the act is against sound morals, or is *malum in se*, or is only against positive legislation, as *malum prohibitum*, although otherwise it might be lawful. In all such cases, the contract has no legal obligation. Thus, if a person is authorized by another to smuggle contraband goods belonging to the latter, it is a void mandate; and the party is not bound to execute the commission; and if he does execute it, he will not be entitled to recover the expenses incurred by him in the service.[4] And no action will lie to compel the mandatary to account for such goods. In conscience, there may be a moral obligation to restore the goods and to account for the profits. But the law leaves the violators of its precepts to their own remedies, and assists neither.[5] This is an exam-

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R. 51; Eyre *v.* Dunsford, 1 East, R. 318; Haycraft *v.* Creasy, 2 East, R. 92. See also, Fell on Guaranty, passim.

[1] Lethbridge *v.* Phillips, 2 Stark. 544.

[2] Pothier, Contrat de Mandat, n. 7; 1 Stair, Inst. B. 1, tit. 12, § 4.

[3] Pothier, Pand. Lib. 17, tit. 1, n. 3; Dig. Lib. 17, tit. 1, l. 6, § 3; Ayliffe, Pand. B. 4. tit. 10, p. 476, 477, 479.

[4] See Pothier, de Mandat, n. 7, 8; 1 Story on Eq. Jurisp. § 296 to 300.

[5] Pothier, Contrat de Mandat, n. 7, 8; Pothier, Pand. Lib. 17, tit. 1, n. 3; 1 Story on Eq. Jurisp. § 296 to 300.

ple of a prohibition by positive law. But the rule is the same, if a person undertakes to carry poison for the purpose of poisoning another; or undertakes to do some act about goods, for the purpose of having them used in a house of infamy.[1]

§ 159. But suppose the case of an act which is lawful in itself, but not strictly lawful with reference to certain relations between the parties, or others. As if a trustee authorizes another person to buy or to sell, or to carry away the goods of the *cestui que trust*, in violation of his trust, would a legal contract arise between the trustee and the mandatary? Pothier puts the case of a tutor or guardian, who authorizes another person, who knows the relation, to become the highest bidder for him at the sale of his pupil's or ward's property, which is an act interdicted by law; and he supposes the inquiry to be made whether the mandate is valid or not. To which he replies, that, in such a case, the mandatary may properly refuse to execute the mandate. But if he does execute it, then it becomes a valid mandate, to the extent of making him liable to account to the tutor. *A fortiori*, the mandator will not be permitted to set up its nullity, in order to escape from the payment of the expenses of the mandatary. And Pothier distinguishes between those acts which are positively forbidden by the law, or involve moral turpitude, and those acts which the law forbids upon the policy of suppressing fraud.[2] In the common law, the case would probably turn upon the question, whether it was an actual fraud, meditated by the parties to injure the *cestui que trust*, or only a constructive fraud, consistent with good faith, but inconsistent with the juridical policy, which governs in cases of trusts. In the latter case, at least, it might not be deemed utterly void, but only voidable at the election of the *cestui que trust*. If he ratified it, there would be no reason to consider it a mere nullity.[3] If the mandatary is ignorant of the illegality, he would of course be entitled to his action for an indemnity.[4]

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[1] Ibid.; Dig. Lib. 17, tit. 1, l. 12, § 11; Pothier, Pand. Lib. 17, tit. 1, n. 3.

[2] Pothier, Contrat de Mandat, n. 11.

[3] See 1 Story on Eq. Jurisp. § 317 to 323; 2 Story on Eq. Jurisp. § 1261, 1262.

[4] Pothier, Pand. Lib. 17, tit. 1, n. 4.

§ 160. Lastly. There is no particular form or manner of entering into the contract of mandate prescribed either by the common law, or by the civil law, in order to give it validity. It may be verbal, or in writing; it may be express, or implied; it may be in a solemn form, or in any other manner.[1] Thus, the civil law declares: *Obligatio mandati consensu contrahentium consistit. Ideo per nuntium quoque, vel epistolam, mandatum suscipi potest. Item, sive rogo, sive volo, sive mando, sive alio quocumque verbo scripserit, mandati actio est.*[2] The French law, in certain cases, requires it to be in writing; but this is a matter of positive institution.[3] Our law has introduced no such positive restriction, although it has in some kinds of contracts, as, for example, in those enumerated in the statute of frauds, required the solemnity of a writing to give them validity.[4] [Neither is it necessary, in all cases, that there should be an actual delivery of the article bailed, to the mandatary in person; an agency may be implied in a third person to receive the mandate, from various circumstances; in the same manner as in bailments for hire.[5]]

§ 161. The contract of mandate may be varied at the pleasure of the parties; it may be absolute or conditional; general or special; temporary or permanent.[6] In the sense of the civil and foreign law, a power of attorney to do any act or acts is a mandate or procuration, and is governed by the principles applicable to such a contract.[7] *Procurator et ad litem futuram, et in diem, et sub conditione, et usque ad diem dari potest, et in*

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[1] Pothier, Pand. Lib. 17, tit. 1, n. 19.

[2] Pothier, Pand. Lib. 17, tit. 1, n. 19; Dig. Lib. 17, tit. 1, l. 1; Id. § 1, 2; 1 Stair, Inst. B. 1, tit. 12, § 11, 12; Ersk. Inst. B. 3, tit. 3, § 33.

[3] Pothier, Contrat de Mandat, n. 28 to 36; Merlin, Repert. Mandat, § 1, art. 7.

[4] Stat. of 29 Car. 2, ch. 3; 2 Story on Eq. Jurisp. § 752 to 755; Long on Sales, ch. 2, p. 44 [27] to p. 91 [88], Rand's edit. 1839.

[5] Lloyd *v.* Barden, 3 Strobh. 343.

[6] Wood, Civ. Law, 242; 1 Domat, B. 1, tit. 15, § 1, art. 6, 7, 8; Pothier, Contrat de Mandat, n. 34, 35, 36.

[7] Ibid.; Pothier, Contrat de Mandat, n. 1, 30, 31; Code Civil of France, art. 1984; Ayliffe, Pand. B. 4, tit. 10, p. 476 to 480; Merlin, Repert. Mandat, § 1, art. 8; Pothier, Pand. Lib. 17, tit. 1, n. 1, 79; Ante, § 137.

perpetuum.[1] But in the common law, as has been already intimated, such cases are treated as cases of naked agency.[2]

§ 162. The next inquiry naturally arising is, between what parties the contract may take effect. The general answer is, that it may take effect between all parties who are capable and willing to enter into contracts. Married women and minors may doubtless become mandataries.[3] But, inasmuch as they are not capable of entering into contracts to bind themselves to any responsibility, there may not be the same remedy against them in many cases, as there is in respect to persons possessing full capacity. Their acts, when done, may bind the mandator; but it does not follow, that they would be liable for an imperfect or ill execution of the thing committed to their charge. A married woman, or a minor, may also become a mandator; but the mandatary may not have any remedy against them upon the implied obligations of the contract; although they may have a remedy against him.[4] The principles, however, which are applicable to this subject, turn upon the general rights and disabilities of married women and minors in respect to contracts generally, and therefore they do not require any particular enumeration in this place.[5]

§ 163. The next inquiry is, what are the obligations arising in point of law, on each side, from the contract of mandate, when made between competent parties. And first, as to the mandatary. Pothier lays it down, that the mandatary incurs three obligations; first, to do the act, which is the object of the mandate, and with which he is charged; secondly, to bring to it all the care and diligence which it requires; and thirdly, to render an account of his doings to the other party.[6] The Code of France has given a positive sanction to the same

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[1] Dig. Lib. 3, tit. 3, l. 3, 4.

[2] Ante, § 139, 142.

[3] Story on Agency, § 485.

[4] See Ante, § 50. See also, Pothier, Traité de Dépôt, n. 5, 6.

[5] Merlin, Repert. Mandat, § 1, art. 9.

[6] Pothier, Contrat de Mandat, n. 37; Id. n. 200; Merlin, Repert. Mandat, § 2; Pardessus, Droit Comm. tom. 2, § 558 to 560.

obligations,[1] as has also the Code of Louisiana.[2] The doctrines of each are directly derived from the text of the civil law.[3] It may be well to consider, how far these principles have been engrafted into the common law; and the limitations and qualifications with which they are received in that law, as well as in the foreign law.

§ 164. And here the first point which meets us is, how far the mandatary is under an obligation to perform the act, which he has undertaken to do. The general principle of the civil law certainly is, that, although a bailee is at liberty to reject a mandate, yet, if he chooses to accept it, he is bound to perform it according to his engagement; and if he fails so to do, he will be liable for all damages sustained by the mandator by his neglect, in like manner as he would be liable for any misfeasance. The rule in the Digest is thus laid down: *Sicut autem liberum est, mandatum non suscipere; ita susceptum consummari oportet, nisi renunciatum sit. Si susceptum non impleverit, tenetur. Quod mandatum susceperit, tenetur, etsi non gessisset.*[4] *Qui mandatum suscepit, si potest id explere, deserere promissum officium non debet; alioquin, quanti mandatoris intersit, damnabitur.*[5] *Procuratorem non tantum pro his, quæ gessit, sed etiam pro his, quæ gerenda suscepit, præstare necesse est.*[6] Certain excuses, however, for non-performance were admissible in the civil law; such as ill health, and other just causes of hinderance, among which were enumerated deadly enmities (*capitales inimicitiæ.*[7]) And if no loss or injury was sustained by the mandator, or the mandatary renounced it in a seasonable time to prevent injury, no action lay.[8] *Mandati actio tunc*

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[1] Code Civil of France, art. 1991, et seq.

[2] Code of Louisiana (1825), art. 2971, 2972, 2973.

[3] 1 Domat, B. 1, tit. 15, § 3, art. 1, et seq.; Dig. Lib. 17, tit. 1, l. 5, § 1; Id. l. 6, § 1; Id. l. 22, § 11; Inst. Lib. 3, tit. 27, § 11.

[4] Dig. Lib. 17, tit. 1, l. 5, § 1; Id. l. 6, § 1; Id. l. 22, § 11; Inst. Lib. 3, tit. 3, l. 27, 35; Pothier, Pand. Lib. 17, tit. 1, n. 25 to 29; Pothier, Contrat de Mandat, n. 38; Ayliffe, Pand. B. 4, tit. 10, p. 478, 479.

[5] Dig. Lib. 17, tit. 1, l. 27, § 2; Pothier, Contrat de Mandat, n. 38.

[6] Cod. Lib. 4, tit. 35, l. 11; Pothier, Contrat de Mandat, n. 38.

[7] Dig. Lib. 17, tit. 1, l. 23, 24, 25; 1 Domat, B. b, tit. 15, § 3, art. 1; Pothier, Contrat de Mandat, n. 39, 40, 41.

[8] Dig. Lib. 17, tit. 1, l. 22, § 11, l. 27, § 2.

competit, cum cœpit interesse ejus qui mandavit. Cæterum, si nihil interest, cessat mandati actio; et eatenus competit, quatenus interest.[1] And if the neglect of the mandatary were owing to the inability of the mandator to perform his own implied obligations, such as to furnish funds for the object, there the former was excused. *Et sit iniquum* (says the civil law) *damnosum cuique esse officium suum.*[2] The same rules governed in the old French law, as expounded by Domat and Pothier;[3] and they are now substantially incorporated into the modern Code of France.[4] The Scotch law also recognizes them in their full extent.[5]

§ 165. Sir William Jones has strenuously contended, that the same doctrine substantially belongs in the common law. He admits, indeed, what cannot be denied, that, in the common law, there is a clear distinction between cases of nonfeasance and misfeasance. In cases of nonfeasance the mandatary is not generally liable, because, his undertaking being gratuitous, there is no consideration to support it, and it becomes a *nude pact;* and the rule is, *Ex nudo pacto non oritur actio.* But in cases of actual misfeasance, the common law gives a remedy for the injury done, and to the extent of that injury. But while he admits this distinction, and its consequences, to be well settled, he contends that the rule, as to nonfeasance, applies only where no special damage or injury accrues to the mandator; and that, in cases of such special damage or injury, an action will lie.[6]

§ 166. But this doctrine of Sir William Jones, however rational and equitable it may seem to be, upon the ground stated by the great Roman lawyer, Paulus: *Adjuvari quippe*

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[1] Dig. Lib. 17, tit. 1, l. 8, § 6; Id. l. 22, § 11; Id. l. 27, § 2; Pothier, Contrat de Mandat, n. 38.

[2] Pothier, Contrat de Mandat, n. 41; Dig. Lib. 29, tit. 3, l. 7.

[3] 1 Domat, B. 1, tit. 15, § 3, art. 1, 12, § 4, art. 3, 4, 5; Pothier, Contrat de Mandat, n. 38 to 42.

[4] Code Civil of France, art. 1991 to 1997. See Code of Louisiana (1825), art. 2972.

[5] Ersk. Inst. B. 3, tit. 3, § 35, 40; 1 Stair, Inst. B. 1, tit. 12, § 9.

[6] Jones on Bailm. 53, 57, 61, 120.

nos, non decipi, beneficio oportet;[1] and, however reprehensible it may be in morals to break a deliberate promise of this sort, it cannot be affirmed to constitute an actual element in the common law. The early cases in the Year Books, which have been commented upon by Sir William Jones with much ingenuity, and by Mr. Chief Justice Kent with admirable fulness and accuracy, may not be thought entirely satisfactory or conclusive upon the point. But the modern cases of Elsee *v.* Gatward[2] [and Balfe *v.* West[3]], in England, and of Thorne *v.* Deas,[4] in America, which were very fully argued and deliberately considered, appear to conclude the question, so far as judicial reasoning goes, in both countries.[5] Mr. Chancellor Kent, in his Commentaries, upon a very full review, has given the doctrine of these cases his entire approbation.[6] If the question were now open for controversy, it might not be uninstructive to examine the decisions at large, and the reasoning by which they are supported. But it is believed that the authorities already referred to contain all that is material; and it would be a waste of time to subject them to a critical analysis for purposes of mere speculative argument.

§ 167. The ground upon which this doctrine of the common law is founded, has often been a matter of doubt and inquiry by ingenious minds. There is so much apparent equity in allowing compensation for injuries, resulting from a misplaced confidence in others, that it is not easily reconcilable with a sense of justice, to allow the contrary rule to prevail. Besides, there is an artificial refinement in the distinction between nonfeasance and misfeasance, which seems to be a little unphilosophical, and not quite agreeable to the dictates of common sense.

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[1] Jones on Bailm. 57; Dig. Lib. 13, tit. 6, l. 17, § 3.

[2] 5 Term Rep. 143.

[3] 22 Eng. Law & Eq. R. 506.

[4] 4 Johns. Rep. 84.

[5] See also, Coggs *v.* Bernard, 2 Ld. Raym. 909, 919, 920; Rutgers *v.* Lucet, 2 Johns. Cas. 92; Doct. and Stud. Dial. 2, ch. 24, p. 210; Wilkinson *v.* Coverdale, 1 Esp. R. 75.

[6] 2 Kent, Comm. Lect. 40, p. 569 to 573, 4th edit.

§ 168. It is not easy in all cases to give satisfactory reasons for doctrines, which are, nevertheless, firmly established in the jurisprudence of many countries. In some instances these doctrines were probably founded upon accidental or temporary reasons; in others, upon false theories; and in others, again, upon what may fairly be deemed a mere measuring cast of conflicting opinions. But, whenever a doctrine is established in either way, it cannot, upon the theory of our judicial institutions, be broken in upon, without disturbing the certainty as well as the harmony, of the law. Perhaps it would have been better, if the distinction alluded to had never been recognized, and the broad principle of the Roman Code, which gives a remedy in all cases of special damage, had been universally proclaimed.[1] It is not, however, difficult to perceive some of the reasons, upon which the common law has stopped at its present point, as that law generally aims more at practical good, than at mere theoretical consistency.

§ 169. There are many rights and duties of moral obligation, which the common law does not even attempt to enforce. It deems them of imperfect obligation, and therefore leaves them to the conscience of the individual. And, in a practical sense, there is wisdom in this course; for judicial tribunals would otherwise be overwhelmed with litigation, or would become scenes of the sharpest conflict upon questions of casuistry and conscience. It is a fundamental principle of the common law, that a valuable consideration is necessary to support every parol contract; and the importance of such a consideration is never lost sight of, except in solemn instruments under seal. A gratuitous executory contract, not under seal, is, therefore, absolutely void.[2] It has no legal existence or power. Now, a mandate is precisely a contract of this nature. What reason, then, is there for excepting this particular class of contracts out of the general rule, any more than many, or even all others? It may not involve more of good faith or confidence than many others. We must, then, either dispense

[1] See Kent, C. J. in Thorne *v.* Deas, 4 Johns. R. 84.

[2] Coggs *v.* Bernard, 2 Ld. Raym. 909, 911, 919; Elsee *v.* Gatward, 5 T. R. 143; Doct. and Stud., Dial. 2, ch. 24, p. 210, 211.

with the general rule, or with the exceptions or draw an arbitrary line between them. The common law has adhered to the general rule, as the wisest and safest, both in principle and application. The rule being once known and established, there cannot be any real ground of complaint on the part of the mandator. He knew, or might have known (and his ignorance of the law cannot constitute any better excuse in this than in other cases), that the contract was a nullity. It was his own folly or rashness to confide in it. If he trusted to it, he took the risk of the non-fulfilment upon himself, and he has no right to complain that he has suffered by that risk a loss which has been the result of his own overweening confidence.

§ 170. In regard to the distinction between nonfeasance and misfeasance, although it is nice, it may be accounted for in this way. The mandatary has his choice, to renounce the contract, or to perform it; to treat it as a nullity, or as a subsisting obligation.[1] If he chooses to consider it in the latter light, and to act upon it as obligatory, why should he be permitted to separate the parts of the obligation, or to disjoin those which were entered into as a whole? Besides, an injury accrues, and the mandator sues the other party for the wrong. The wrong is admitted, and the party sets up the contract in his defence. Ought the law to give him the benefit of the contract, as a subsisting obligation, to protect him from being deemed a mere unauthorized wrongdoer; and yet, at the same time, to enable him to escape from its obligations, by proving that he has violated the fundamental terms of that very contract? The common law has deemed it unreasonable that he should have such an indulgence. It has left him free to act, or not to act; but if he chooses to act, it is at his own peril. He is not at liberty to commit a tort, and then shift his defence upon the imperfect obligation of a contract, under which the tort was done. It is difficult to affirm that there is any thing positively inequitable or unjust in this; and it is not inconsistent with the general rule, as to *nude pacts*, that the common law should give a remedy for injuries occasioned by an unskilful or mischievous execution of the trust.[2]

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[1] Elsee *v.* Gatward, 5 T. R. 143; Ante, § 2, n. 1, p. 2.

[2] Coggs *v.* Bernard, 2 Ld. Raym. 909, 918, 919.

§ 171. Whether this reasoning is entirely satisfactory or not, it furnishes the key to the doctrine now under consideration; and if the result is thought to be inconvenient, it exclusively belongs to the legislative power to apply the proper remedy. It may, however, be observed, that it is generally a favorite policy of the common law to prompt men to vigilance and care in their own concerns, and not to an overweening confidence in others. The maxim, *Caveat emptor*, rests on this foundation; and it has not, hitherto, been thought wrong in principle, or found inconvenient in practice.

§ 171 *a*. But, although the distinction is thus clearly established in the common law, between cases of nonfeasance and cases of misfeasance in a mandatary, and the former will not confer a right of action, but the latter will; yet the just application of the doctrine may become matter of very serious importance. The ground of the doctrine in the cases of nonfeasance is (as we have seen), that there is no consideration; and the rule is, *Ex nudo pacto non oritur actio.* But this rule is inapplicable, where the mandate has been fully executed on the part of the mandator, as if he has delivered the thing, which is the subject of the mandate, to the mandatary; for in such cases there arises, from such a delivery and receipt, a sufficient consideration to support the contract, and to found an action for any negligence or omission, in the due execution of the mandate.[1] It is not necessary, to constitute a sufficient consideration to support the contract, that the bailee should derive some benefit from it. It will be sufficient if the bailor, on the faith of the promise, parts with some present right, or delays the present use of some right, or suffers some immediate prejudice or detriment, or does some act at the bailee's request.[2] Thus, for example, if A should intrust a letter to B, containing money, to pay his note at a bank in Boston, due on a particular day, and B should gratuitously undertake to deliver the

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[1] Year Book, 2 Hen. 7, 11; Coggs *v.* Bernard, 2 Ld. Raym. 919, 920; Ante, § 2, sub finem, note (2).

[2] Ante, § 2, sub finem, note (2); Com. Dig. *Action on the Case on Assumpsit*, B. 1, 3, 4, 6, 11; Williamson *v.* Clements, 1 Taunt. R. 523; Longridge *v.* Dorville, 5 Barn. & Ald. 117.

letter, and take up the note on that day, and he should neglect to carry the letter, or to take up the note, whereby the note should be protested, and A should suffer a special damage, B would at the common law be liable to an action for his negligence, and the delivery of the letter to B, under such circumstances, would be a part execution, and a sufficient consideration to support the action.

§ 171 *b*. Upon the same ground, if a mandatary should gratuitously undertake to carry, or to pay, or to transmit, money for a mandator to a particular place, there to be paid on a particular day, and the money should be delivered to him for that purpose, he would be bound by his receipt of the money to carry, pay, or transmit the money accordingly; and if he should omit to do so, he would be responsible for his negligence to the mandator; for the delivery of the money to him would constitute a sufficient consideration for his undertaking; and it would also be on his part an inception or part execution of the mandate.[1] And yet, if he had not received the money, the undertaking would have been a mere *nude pact*.[2]

§ 171 *c*. Upon the same ground, if a bank should gratuitously undertake to collect the money on a note, when due, upon the note being indorsed in blank, and left in the bank, and the bank should neglect to present the same duly for payment, or should neglect to give due notice to the indorsers of the dishonor, when duly presented, it would be responsible to the holder for such neglect. For the indorsement and delivery of the note to the bank would constitute a sufficient consideration to maintain an action of assumpsit upon the implied promise of due diligence, and the breach thereof by such negligence.[3]

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[1] See Jenkins *v.* Motlow, 1 Sneed, (Tenn.) R. 248; Kirtland *v.* Montgomery, 1 Swan, (Tenn.) 457.

[2] Shillibeer *v.* Glyn, 2 Mees. & Welsb. 145; Wheatley *v.* Low, Cro. Jac. 667. See also, Beauchamp *v.* Powley, 1 Mood. & Rob. 38; Fellowes *v.* Gordon, 8 B. Monroe, 415; Ferguson *v.* Porter, 3 Florida, 38; Coggs *v.* Bernard, 2 Ld. Raym. 909, 918, 919; Ante, § 2, sub finem, note (2).

[3] Smedes *v.* Bank of Utica, 20 Johns. R. 377, 385; s. c. in Error, 3 Cowen, R. 662, 683, 684; Bank of Utica *v.* McKinster, 11 Wend. R. 473; Callender *v.* Oelrichs, 1 Arnold, R. 401, 402; Ante, § 2, sub finem, note (2).

§ 171 *d*. This doctrine of the common law is in precise coincidence with that deduced from the rule of the Roman law applied to similar cases. Thus, it has been held in Louisiana, that if a bank, with which a note is lodged for collection by the holder, omits to present it for payment at maturity, the bank, although it acts gratuitously, will be responsible for its negligence to the holder. On that occasion, the court said: "If he, who undertakes the business of another, is capable of managing it, and neglects to do so with due care, he is responsible. If he is not capable, he is still answerable; for he ought not to have engaged to do that which he could not perform. *A procuratore dolum, et omnem culpam, non etiam improvisum casum præstandum esse, juris autoritate manifeste declaratur.* The principles above laid down govern as well in cases of gratuitous agencies as in others. The truth is, that they are derived from the Roman law, in which no such thing was known as agency for a salary."[1]

§ 172. The same rule, which is applied by the common law to cases of malfeasance, governs also cases of the negligent execution of a gratuitous trust or agency. As, for instance, if a gratuitous agent should undertake to procure a policy of insurance, which is in his own name, to be renewed, and assigned to a party, who has become a purchaser of the property insured, and he should proceed to procure a renewal of the policy, but should not indorse thereon an assignment to the purchaser, and obtain the allowance thereof by the underwriters (which are necessary acts to make the policy valid in favor of the purchaser), so that, upon a subsequent loss of the property, no recovery could be had by the purchaser, he will be responsible for the loss; although if he had done nothing, he would have been exonerated from all responsibility.[2] [So if a person gratuitously undertakes the duties of steward of a horse-race, but does not commence to perform such duties, he is not liable for negligent nonfeasance in not appointing a judge.[3]]

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[1] Durnford *v.* Patterson, 7 Martin, R. 469, cites Cod. Lib. 4, tit. 35, l. 13.

[2] Wilkinson *v.* Coverdale, 1 Esp. Rep. 75; Marsh. Insur. B. 1, ch. 8, § 29, p. 299; French *v.* Reed, 6 Binney, 308; Ferguson *v.* Porter, 3 Florida, 38.

[3] Balfe *v.* West, 22 Eng. Law & Eq. R. 506.

§ 173. In the next place, what is the degree of care or diligence which the mandatary is bound to apply in respect to the thing committed to his charge? It is not, perhaps, very easy to ascertain from the texts of the Roman law, what was the degree of diligence exacted by that law in all cases of mandataries. The language in Ulpian's famous law is, that in mandates the party is liable for deceit and neglect, *Dolum et culpam mandatum.*[1] In other passages, something more would seem to be required, and even a very high degree of diligence. Thus, in the Code it is said, that a procurator is liable for fraud, and every neglect: *A procuratore dolum et omnem culpam, non etiam improvisum casum præstandum esse, juris autoritate manifeste declaratur.*[2] The treatise of Sir William Jones abundantly shows, that civilians are not agreed among themselves, as to the true interpretation of the Roman law on this point.[3] And Domat is manifestly perplexed in his own attempt to explain it.[4] Ayliffe says: "In a commission (mandate), sometimes the exactest diligence is required, as in a proctor *ad lites;* and then he shall be liable for the smallest neglect or fault, because he asserts himself to be skilful in the business relating to judicial matters. Sometimes only an exact diligence is required, as in the payment of money; and then the person executing such commission shall be answerable *de latâ et levi culpâ.* And sometimes a commission granted, which requires little or no diligence, because every person may speed such an act, as to carry a letter or book from one person to another, and then the person is only liable for fraud and gross negligence, unless he has received a reward for so doing."[5] Heineccius, one of the most exact of jurists, seems to adopt the conclusion, that, by the Roman law, a mandatary is liable not only for fraud or deceit, but for neglect, although very slight. *Ut non solum dolum sed et culpam, etiam levissimam, præstare*

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[1] Dig. Lib. 50, tit. 17, l. 23; Jones on Bailm. 14, 15, 16.

[2] Cod. Lib. 4, tit. 35, l. 13; Pothier, Pand. Lib. 17, tit. 1, n. 35, 36.

[3] Jones on Bailm. 14, &c.

[4] 1 Domat, Civ. Law, B. 1, tit. 15, § 3, art. 4, 5. See also, Ayliffe, Pand. B. 4, tit. 10, p. 478.

[5] Ayliffe, Pand. B. 4, tit. 10, p. 478.

debeat.[1] Pothier (admitting at the same time that it is an exception to the common rule) asserts the true principle to be, as well in the Roman as in the French law, that the mandatary is not only bound to good faith, but is also bound to bestow on the matter, with which he is charged, all the diligence and all the skill which the proper execution of it requires.[2] And he holds the mandatary liable, not merely for fraud and faults of commission or misfeasance, but also for all faults of omission or negligence. According to him, every mandatary engages himself for every thing necessary to accomplish his undertaking; and consequently for all the care and diligence required by it: *Spondet diligentiam et industriam negotio gerendo parem.* If, therefore, the mandatary exerts himself to his utmost capacity, and yet he has not sufficient skill to accomplish the undertaking, he is, according to Pothier, still responsible; for he should have made a better estimate of his capacity, and he should not have engaged in the undertaking.[3] Pothier does not, indeed, insist, that in all cases he shall exert the same care and diligence, that the most diligent and attentive men do. But he holds him liable even for the slightest neglect (*levissimâ culpâ*), in affairs requiring extraordinary diligence; and in affairs requiring only ordinary diligence, for slight neglect (*levi culpâ*).[4] He allows, indeed, some indulgence, where the mandatary has been pressed into the service, because a competent person could not be found; for, in such a case, he admits that the mandatary ought not to be held responsible for any more diligence or skill than he possesses.[5] And he exempts the mandatary from all responsibility for losses from mere accidents and superior force, unless he has entered into some stipulation to the contrary.[6] But, on the other hand, he holds the mandatary to be at liberty to exempt himself from all responsibility, except for fraud, by an exceptive stipulation.[7] The

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[1] Heinec. Elem. Pand. Lib. 17, tit. 1, § 233.
[2] Pothier, Contrat de Mandat, n. 46 to 49.
[3] Pothier, Contrat de Mandat, 46, 47, 48, 208.
[4] Id. n. 49.
[5] Id. n. 49.
[6] Id. n. 50.
[7] Id. n. 50.

modern Code of France does not speak so definitely on this subject as it might; but it seems silently to pursue the lead of Pothier.[1] The Code of Louisiana is to the same effect as that of France.[2]

§ 173 *a.* This doctrine of Pothier has been combated with great ability, and in my judgment with entire success, by a learned Judge, whose judicial life has been devoted to the administration of the jurisprudence derived from the Roman, the French, and the Spanish law. His language on the occasion was: "It is said by a writer of great authority (Pothier), who treats the doctrine of mandate, that the mandatary cannot excuse himself by alleging a want of ability to discharge the trust undertaken. That it will not be sufficient for him to say he acted to the best of his ability, because he should have formed a more just estimate of his own capacity before he engaged himself. That if he had not agreed to become the agent, the principal could have found some other person willing and capable of transacting the business correctly. This doctrine, if sound, would make the attorney, in fact, responsible for every error in judgment, no matter what care and attention he exercised in forming his opinion. It would make him liable to the principle in all doubtful cases, where the wisdom or legality of one or more alternatives was presented for his consideration, no matter how difficult the subject was. And if the embarrassment in the choice of measures grew out of a legal difficulty, it would require from him knowledge and learning, which the law only presumes in those who have made the jurisprudence of their country the study of their lives, and which knowledge often fails in them, from the intrinsic difficulty of the subject, and the fallibility of human judgment.[3] It is, no doubt, true, that, if the business to be transacted, presupposes the exercise of a particular kind of knowledge, a person who

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[1] Code Civil of France, B. 3, tit. 13, ch. 2, art. 1992; Merlin, Repert. Mandat, § 2, art. 3.

[2] Code of Louisiana (1825), art. 2972. See Hodge's Heirs *v.* Durnford, 13 Martin, R. 100, 125, 126, where Mr. Justice Porter suggests a doubt whether the Spanish law goes so far. See also, Percy *v.* Millaudon, 20 Martin, R. 68.

[3] Pothier, Traité de Mandat, n. 48.

should accept the office of mandatary, totally ignorant of the subject, could not excuse himself on the ground that he discharged his trust with fidelity and care. A lawyer who should undertake to perform the duties of a physician, a physician who should become an agent to carry on a suit in a court of justice, a bricklayer who should propose to repair a ship, or a landsman who should embark on board a vessel to navigate her, may be presented as examples to illustrate this distinction. Thus, it was a provision of the Spanish law, *Gran culpa es aquel, que se trabaja de facer cosa, que non sabe, o quel non conviene.* (Part. 7, tit. 33, ley 13.) But when the person who is appointed attorney in fact has the qualifications necessary for the discharge of the ordinary duties of the trust imposed, we are of opinion, that, on the occurrence of difficulties in the exercise of it, which offer only a choice of measures, the adoption of a course from which loss ensues, cannot make the agent responsible, if the error was one into which a prudent man might have fallen. The contrary doctrine seems to us to suppose the possession, and require the exercise of perfect wisdom in fallible beings. No man would undertake to render a service to another on such severe conditions. The reason given for the rule, namely, that, if the mandatary had not accepted the office, a person capable of discharging the duty correctly would have been found, is quite unsatisfactory. The person who would have accepted, no matter who he might be, must have shared in common with him who did accept, the imperfection of our nature, and consequently must be presumed just as liable to have mistaken the correct course. The test of responsibility, therefore, should be, not the certainty of wisdom in others, but the possession of ordinary knowledge; and by showing that the error of the agent is of so gross a kind, that a man of common sense and ordinary attention would not have fallen into it. The rule which fixes responsibility because men of unerring sagacity are supposed to exist, and would have been found by the principal, appears to us essentially erroneous."[1]

§ 174. Let us now proceed to the consideration of the man-

[1] Mr. Justice Porter in Percy *v.* Millaudon, 20 Martin, R. 75 to 79.

ner in which the common law has treated this subject. According to the general principles, which have been already stated, a mandatary, as the contract is wholly gratuitous and for the benefit of the mandator, is bound only to slight diligence, and of course is responsible only for gross neglect.[1] And this, it is conceived, is the doctrine of the common law universally applied to mandates.[2]

§ 175. Sir William Jones, however, has taken a distinction, and maintained that there is a difference of principle in respect to the two classes into which he divides mandates; (1) A mandate to do work about goods; (2) A mandate to carry goods from place to place.[3] In respect to the latter, he adopts without hesitation the doctrine, that the party is bound only to good faith and slight diligence, and is responsible only for gross neglect.[4] But in respect to the former, he holds that the mandatary engages to use a degree of diligence and attention adequate to the due performance of the undertaking. It may be well to give his reasoning in his own words. "The great distinction, then," says he, "between one sort of mandate and a deposit is, that the former lies in feasance, and the latter simply in custody; whence, as we have already intimated,[5] a difference often arises between the degrees of care demanded in the one case and the other. For, a mandatary being considered as having engaged himself to use a degree of diligence and attention adequate to the performance of his undertaking, the omission of such diligence may be, according to the nature of

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[1] Doorman *v.* Jenkins, 2 Adolph. & Ellis, 256; s. c. 4 Nev. & Mann. 170; Beardslee *v.* Richardson, 11 Wend. 25; 2 Kent, Comm. Lect. 40, p. 571, 572, 4th edit.; Lampley *v.* Scott, 24 Miss. 528.

[2] Ibid. The question, whether there is gross negligence or not, seems in general to be a matter of fact for the jury upon all the circumstances, rather than of law for the Court. Doorman *v.* Jenkins, 2 Adolph. & Ellis, 256; s. c. 4 Nev. & Mann. 170; Vaughan *v.* Menlove, 3 Bing. N. C. 468, 475; Ante, § 11; Beardslee *v.* Richardson, 11 Wend. R. 25.

[3] Jones on Bailm. 53, 62, 117, 120.

[4] Coggs *v.* Bernard, 2 Ld. Raym. 909; Jones on Bailm. 62, 63; Beauchamp *v.* Powley, 1 Mood. & Rob. 38; Doorman *v.* Jenkins, 2 Adolph. & Ellis, 256; s. c. 4 Nev. & Mann. 170. See Dartnall *v.* Howard, 4 Barn. & Cress. 345.

[5] Jones on Bailm. 22.

the business, ordinary or slight neglect; although a bailee of this species ought regularly to be answerable only for a violation of good faith. This is the common doctrine taken from the law of Ulpian. But there seems in reality to be no exception in the present case from the general rule; for since good faith itself obliges every man to perform his actual engagements, it of course obliges the mandatary to exert himself in proportion to the exigence of the affair in hand; and neither to do any thing, how minute soever, by which his employer may sustain damages, nor omit any thing, however inconsiderable, which the nature of the act requires. Nor will a want of ability to perform the contract be any defence for the contracting party; for though the law exacts no impossible things, yet it may justly require that every man should know his own strength before he undertakes to do an act; and that, if he deludes another by false pretensions to skill, he shall be responsible for any injury that may be occasioned by such delusion. If, indeed, an unskilful man yield to the pressing instances of his friend, who could not otherwise have his work performed, and engage reluctantly in the business, no higher degree of diligence can be demanded of him than a fair exertion of his capacity."[1] In other passages he enlarges on the same point.[2] And he adds, in another place: "A bailment without reward to carry from place to place, is very different from a mandate to perform work. And there being nothing to take it out of the general rule, I cannot conceive that the bailee is responsible for less than gross neglect, unless there be a special acceptance, &c. Every thing, therefore, that has been expounded in the preceding article concerning deposits, may be applied exactly to this sort of bailment, which may be considered as a subdivision of the second species."[3]

§ 176. If this distinction, taken by Sir William Jones, is clearly settled in the common law, it ought to be acquiesced in, even if the reasons on which it is built should not be thought entirely satisfactory. But the inquiry naturally presents itself,

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[1] Jones on Bailm. 53; Pothier, Contrat de Mandat, n. 49.

[2] Jones on Bailm. 22, 61, 98, 120.

[3] Id. 62, 63; Saltus *v.* Everett, 20 Wend. R. 267.

whether it is thus firmly established. Sir William Jones has cited no authority in support of it; and none has been found, in my researches, which directly recognizes it.

§ 177. It is worthy of remark, that the whole reasoning of Sir William Jones on the point is exclusively derived from the views taken of the civil law by the able commentators already referred to. But they apply the rule to all cases of mandates whatsoever, and by no means limit it to cases where work is to be performed. So far as their authority goes, then, it repudiates the distinction; and so far as their reasoning goes, it proceeds on a basis applicable to every species of mandate.[1] And, indeed, it is very difficult to perceive, in common sense, or in legal principles, any ground upon which the distinction can be maintained. A mandate to carry a thing from one place to another may properly enough be deemed a mandate to perform work; and it imports, just as much as a mandate to do any other work, an engagement to perform the undertaking, and to exercise due diligence and care about it. If A undertakes gratuitously to carry B's goods from one place to another, does not good faith oblige him to perform his undertaking, and to exert proper diligence in proportion to the exigence of the affair? Does not the bailor trust to his fidelity in performing it, with as much confidence, as when he undertakes to do work, strictly speaking, upon the same goods? Why should he not be under the same obligation to carry safely, as to do the work well? When he undertakes to carry, does he not, by necessary implication, engage that he has ability to do so, and that he will exercise all reasonable diligence to accomplish his undertaking? To do work on goods, is not, or may not be, more important, than to carry them to another place. To carry jewels safely may be a far more valuable service, and require far more vigilance, than to clean the gold which enchases them. The same reasoning, then, seems applicable to all classes of mandates; and it is applied in the text of the civil and foreign law, from which

[1] Pothier, Contrat de Mandat, n. 46, 47, 48, 49; Las Siete Partidas, Liv. 5, tit. 12, l. 50 to 25.

the rule is borrowed, indiscriminately to all. Where the act to be done requires skill, and the party who undertakes it either has the skill, or professes to have it, there he may well be made responsible for the want of due skill, or for the neglect to exercise it. In such cases the undertaking may well be deemed a special undertaking to exercise due skill; and the omission of it imports, in all such cases, at least ordinary negligence; and in many cases, operating, as it must, as a fraud upon the party, it may well be deemed gross negligence. But this class of cases stands, not as an exception from the general law, but as a qualification of it from the implied engagement of the mandatary. It is only deciding, that the parties may vary the responsibility, implied by law, by an express or implied contract for this purpose. Sir William Jones himself puts a case, which shows the propriety of admitting this doctrine; for he agrees, that if an unskilful man, who is known to be so, does the work at the solicitation of a friend, with such ability as he possesses, he stands excused, although it is unskilfully done; for it is the mandator's own folly to trust to him, and the party engages for no more than a reasonable exertion of his capacity.[1] It is apparent, then, that the fact of skill, or of want of skill, as known or unknown to the bailor, or professed or not professed, by the bailee, constitutes a material ingredient in construing the engagement, and qualifies or enlarges it. In other terms, it varies the presumption as to the actual contract, according to the express or implied intention of the parties. It is not so much an exception from the common rule, as a waiver or limitation of it.

§ 178. If there be no authority in support of the distinction suggested by Sir William Jones, and none has been produced, let us next inquire, whether there are not authorities, which lead the other way. In the great case of Coggs *v.* Bernard,[2] where all the antecedent authorities were reviewed, and where Lord Holt expounds the nature and responsibility arising from every kind of bailment, no such distinction is

[1] Jones on Bailm. 53, 98. Pothier asserts the same doctrine. Pothier, Contrat de Mandat, n. 49.

[2] 2 Ld. Raym. 909.

hinted at. Yet that was the case of a mandate to carry goods; and Lord Holt says, this undertaking obliges the undertaker to diligent management. The reasons, he says, are, because, in such a case, a neglect is a deceit to the bailor, who trusts the bailee upon his undertaking to be careful; and the latter puts a fraud upon the former by being negligent. And Lord Holt puts, by way of illustration of his doctrine, the case of a mandate of the other sort, namely, an action against a man who had undertaken to keep one hundred sheep; and he was held liable for letting the sheep be drowned by his default. He afterwards puts the case of a carpenter, who unskilfully builds a house without reward; and suggests no difference between that case and a mandate to carry.[1] From these considerations it may fairly be deduced, that, as Lord Holt, in treating on the express point, suggests no such distinction, none was, in his judgment, furnished by the common law. Mr. Justice Gould in the same case said: "If a man takes upon him expressly to do such a fact [act] safely and securely, if the thing comes to any damage by his miscarriage, an action will lie. If it be only a general bailment (that is, without such express undertaking), the bailee will not be answerable without a gross neglect."[2] So that the difference he insists on is between a special contract, and the general obligation, implied by law from the nature of the bailment.

§ 179. The case of Moore *v.* Mourgue[3] probably decided the very question under consideration, if that case was a gratuitous undertaking. There, an agent, having written orders for the purpose, procured a policy of insurance to be made; but in the policy there was an exception of a risk common in the policies of other offices, but not in those used by this office, and the loss arose from that risk; and the same premium was given in all the offices, without any increase on account of such risk. It was held by the Court, that the agent was not liable, as he had acted *bonâ fide*, and to the best of his judgment, and without gross negligence. There is, however, noth-

[1] 2 Ld. Raym. 909, 919, 920.
[2] 2 Ld. Raym. 909.
[3] Cowper, R. 480.

ing on the face of the report, which absolutely settles it to have been a gratuitous undertaking, although the structure of the case would lead to that conclusion.

§ 180. But the case of Shiells *v.* Blackburne[1] seems directly in point against the distinction of Sir William Jones. There, a merchant had undertaken gratuitously, but not, as it should seem, officiously, to enter certain goods of the plaintiff at the custom-house with his own goods of the like kind; and by mistake he entered them by a wrong name, so that all the goods were seized and lost, both the plaintiff's and his own. An action was brought by the plaintiff to recover damages for this misfeasance; and upon full consideration the Court held, that, as there was not any gross negligence, the action would not lie. Now, this was the very case of a mandate to do an act, in contradistinction to one to carry goods. And if the contract did, *per se*, imply an engagement to use all the care and diligence which were necessary to the performance of the act, namely, to make a proper entry at the custom-house, and the bailee omitted so to do, he ought to have been held liable, even if there was not gross negligence. The Court, however, put the case upon the true ground of a general mandate, where there is no special undertaking for skill. Mr. Justice Heath there said: "The defendant was not guilty either of gross negligence or fraud. He acted *bonâ fide*. If a man applies to a surgeon to attend him in a disorder for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action. The surgeon would also be liable for such negligence, if he undertook gratis to attend a sick person, because his situation implies skill in surgery. But if the patient applies to a man of a different employment or occupation for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable. It would be attended with injurious consequences, if a gratuitous undertaking of this sort should subject the person who made it, and who acted to the best of his knowledge, to an action." Mr. Justice Wilson

[1] 1 H. Black. 158.

said: "Where the undertaking is gratuitous, and the party has acted *bonâ fide*, it is not consistent either with the spirit or the policy of the law to make him liable to an action. A wrong entry at the custom-house cannot be considered as gross negligence, when, from the variety of laws, &c., reliance must be placed on the clerks in the office." Lord Loughborough said: "I agree with Sir William Jones, that where a bailee undertakes to perform a gratuitous act, from which the bailor is alone to receive benefit, there the bailee is only liable for gross negligence. But if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence.[1] If in this case a ship-broker, or clerk in the custom-house, had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries. But when an application, under the circumstances of this case, is made to a general merchant to make an entry at the custom-house, such a mistake as this is not to be imputed to him as gross negligence." So that the whole Court held, that a mandatary was not liable, except for gross negligence; and that an express or implied warranty of skill was necessary, under such circumstances, to impute to him gross negligence.

§ 181. The doctrine of the case of Shiells *v.* Blackburne[2] has never been impeached; and it is incidentally confirmed in other analogous cases.[3] So far as the American authorities have gone,[4] they appear to proceed on the same principles, and to deem the mandatary, like the depositary, liable in all cases for gross negligence only.

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[1] See Jones on Bailm. 53, 54, 98.

[2] 1 H. Black. 158.

[3] See Nelson *v.* Macintosh, 1 Stark. R. 237; Rooth *v.* Wilson, 1 Barn. & Ald. 59; Doorman *v.* Jenkins, 2 Adolph. & Ellis, 256; s. c. 4 Nev. & Mann. 170. See Dartnall *v.* Howard, 4 Barn. & Cress. 345.

[4] Stanton *v.* Bell, 2 Hawks, N. C. Rep. 146; Foster *v.* Essex Bank, 17 Mass. R. 479; Whitney *v.* Lee, 8 Metc. 91; Steamboat New World *v.* King, 16 Howard, U. S. R. 475; Tracy *v.* Wood, 3 Mason, R. 182; Tompkins *v.* Saltmarsh, 14 Serg. & Rawle, 275; Percy *v.* Millaudon, 20 Martin, R. 75 to 79; 2 Kent, Comm. Lect. 40, p. 569, 570.

§ 182. Dr. Paley, in his treatise on Moral Philosophy, has, with his usual practical good sense, put the case of mandates upon a reasonable ground. "Whoever," says he, "undertakes another man's business, makes it his own, that is, promises to employ upon it the same care, attention, and diligence, that he would do, if actually his own; for he knows that the business is committed to him with that expectation. And he promises no more than this."[1]

§ 182 *a*. The true rule of the common law would seem, therefore, to be, that a mandatary, who acts gratuitously in a case, where his situation or employment does not naturally or necessarily imply any particular knowledge or professional skill, is responsible only for bad faith or gross negligence. If he has the qualifications necessary for the discharge of the ordinary duties of the trust which he undertakes, and he fairly exercises them, he will not be responsible for any errors of conduct or action, into which a man of ordinary prudence might have fallen. If his situation or employment does imply ordinary skill, or knowledge adequate to the undertaking, he will be responsible for any losses or injuries resulting from the want of the exercise of such skill or knowledge. If he is known to possess no particular skill or knowledge, and yet undertakes to do the best which he can under the circumstances, all that is required of him is the fair exercise of his knowledge, and judgment, and capacity.[2] This general responsibility may be va-

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[1] Paley, Moral Phil. B. 3, P. 1, ch. 12.

[2] See 2 Kent, Comm. Lect. 40, p. 571, 572, 573, 4th edit.; Percy *v.* Millaudon, 20 Martin, R. 75 to 79; Shiells *v.* Blackburne, 1 H. Black. 158; Tompkins *v.* Saltmarsh, 14 Serg. & Rawle, 275; Foster *v.* Essex Bank, 17 Mass. R. 479. Mr. Chancellor Kent has well observed: "It is a little difficult to reconcile the opinions on this point of a gratuitous undertaking to do some business for another; but the case of Shiells *v.* Blackburne contains the most authoritative declaration of the law, in favor of the more limited responsibility of the bailee. There are, however, a number of instances, in which such a mandatary becomes liable for want of due care and attention. Thus, it has been held to be an act of negligence, sufficient to render a gratuitous bailee responsible, for him to have turned a horse after dark into a dangerous pasture, to which he was unaccustomed, and by which means the loss of the horse ensued." 2 Kent, Comm. Lect. 40, p. 572, 4th edit.; Rooth *v.* Wilson, 1 Barn. & Ald. 59.

ried by a special contract of the parties, either enlarging, or qualifying, or narrowing it; and in such cases the particular contract will furnish the rule for the case. The mandatary may take upon himself responsibility for accidents, although a very special contract would be required for such a purpose; and the civil law upon this subject speaks but the general sense of mankind. *Placuit, posse rem hâc conditione deponi, mandatumque suscipi, ut res periculo ejus sit, qui depositum vel mandatum suscepit.*[1] On the other hand a mandatary cannot, any more than any other bailee, stipulate for an exemption of liability for his own fraudulent acts or omissions. *Illud nullâ pactione effici potest, ne dolus præstetur.*[2]

§ 183. *Primâ facie*, in cases of a general mandate, the fact, that the party did the work on the goods bailed with the same care that he did the work on like goods of his own, would repel the imputation of any negligence.[3] But, without doubt, the presumption may be overcome by proofs of actual negligence,[4] or of conduct, which, though applied to his own goods as well as to those bailed, would be deemed negligence, in bailees without hire, of ordinary prudence.[5]

§ 184. Sir William Jones has put a case, aptly illustrating the former position. "If Stephen desire Philip to carry a diamond ring from Bristol to a person in London, and he put it with bank-notes of his own into a letter-case, out of which it is stolen at an inn, or seized by a robber on the road, Philip shall not be answerable for it, although a very careful, or, perhaps, a commonly prudent man would have kept it in his purse at the inn, and have concealed it somewhere in the carriage. But if he were to secrete his own notes with peculiar vigilance, and either leave the diamond in an open room, or wear it on his finger in the chaise, he would be bound, in case of a loss by

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[1] Pothier, Contrat de Mandat, n. 50; Dig. Lib. 17, tit. 1, l. 39; Ante, § 25, 30 to 35, 37; Dig. Lib. 2, tit. 14, l. 7, § 15.

[2] Pothier, Contrat de Mandat, n. 50; Dig. Lib. 2, tit. 14, l. 27, § 3; Ante, § 32.

[3] Lane *v.* Cotton, 1 Ld. Raym. 655; Kettle *v.* Bromsall, Willes, R. 121.

[4] Rooth *v.* Wilson, 1 Barn. & Ald. 59.

[5] Tracy *v.* Wood, 3 Mason, R. 132; 1 Brown, Civ. Law, 383, note.

stealth or robbery, to restore the value of it to Stephen."[1] The case of a robbery may, perhaps, admit of some qualification; for if the robbery were by force, and if every thing found on Philip's person, including his purse, were stolen, then, if the exposure of the ring did not afford any additional temptation, nor aid the loss, it might, perhaps, be thought that the bailee ought to be excused.[2]

§ 185. The other position may be illustrated by a case, which has passed into actual judgment.[3] A undertook, gratuitously, to carry two parcels of doubloons for B, from New York to Boston, in a steamboat, by the way of Providence. A, in the evening (the boat being to sail early in the morning), put both bags of doubloons, one being within the other, into his valise with money of his own, and carried it on board the steamboat, and put it into a berth in an open cabin, although notice was given to him by the steward, that they would be safer in the bar-room of the boat. A went away in the evening and returned late, and slept in another cabin, leaving his valise where he had put it. The next morning, just as the boat was leaving the wharf, he discovered, on opening his valise, that one bag was gone; and he gave an immediate alarm, and ran up from the cabin, leaving the valise open there with the remaining bag, his intention being to stop the boat. He was absent for a minute or two only, and on his return the other bag also was missing. An action being brought against him by the bailor for the loss of both bags, the question was left to the jury whether there was not gross negligence, although the bailee's own money was in the same valise. The jury were directed to consider, whether the party used such diligence as a gratuitous bailee ought to use under such circumstances. They found a verdict for the plaintiff for the first bag lost, and for the bailee for the second.

§ 186. It may be added, that the degree of care which a mandatary may be required to exert, must be materially affected by the nature and value of the goods, and their liability to loss

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[1] Jones on Bailm. 62.

[2] See 1 Brown, Civ. Law, 383, note 73.

[3] Tracy *v.* Wood, 3 Mason, R. 132.

and injury. That care and diligence, which would be sufficient as to goods of small value, or of slight temptation, might be wholly unfit for goods of great value, and very liable to loss and injury. In the former case, the same acts might be deemed slight neglect only, which, in respect to the latter, might justly be deemed gross neglect. Illustrations of this rule have already been presented in another place.[1] Lord Stowell, in the case of the Rendsberg,[2] put a case in point. "If," said he, "I send a servant with money to a banker, and he carries it with proper care, he would not be answerable for the loss, if his pocket were picked on the way. But if, instead of carrying it in a proper manner, and with ordinary caution, he should carry it openly in his hand, thereby exposing valuable property, so as to invite the snatch of any person he might meet in the crowded population of this town, he would be liable, because he would be guilty of the *negligentia malitiosa*, in doing that, from which the law must infer that he intended the event which has actually taken place." Perhaps the best general test is to consider whether the mandatary has omitted that care, which bailees without hire, or other mandataries of common prudence, are accustomed to take of property of the like description.[3]

§ 186 *a*. A very important question recently arose, and was decided, in Louisiana, as to the responsibility of the directors of a bank (who are there treated as falling within the predicament of mandataries) to the stockholders, for any losses sustained by the latter in the course of the management of the concerns of the bank. The doctrine established on that occasion was, that the directors of a bank are bound to the exercise of ordinary diligence and attention in the discharge of their official duties; and if they are guilty of gross negligence or misconduct in their management of the business and property of the bank, they are in their private capacities responsible to the stockholders for any losses occasioned thereby. But for mere errors of judgment, unless of the grossest kind, they are not responsible. Upon this point, the Court said: "The direc-

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[1] Ante, § 15.

[2] 6 Rob. Adm. R. 142, 155.

[3] Tracy *v.* Wood, 3 Mason, R. 132; Ante, § 182, 182 a.

tors of banks, from the nature of their undertaking, fall within the class of cases where ordinary care and diligence only are required. It is not contemplated, that they should devote their whole time and attention to the institution to which they are appointed, and guard it from injury by constant superintendence. Other officers, on whom compensation is bestowed for the employment of their time in the affairs of the bank, have the immediate management. In relation to these officers, the duties of directors are those of control, and the neglect, which would render them responsible for not exercising that control properly, must depend on circumstances, and in a great measure be tested by the facts of the case. If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible."[1]

§ 186 *b*. Upon the ground, however, of gross negligence or wanton disregard of duty, the directors of a bank were, in the same case, held responsible to the stockholders, for losses to the bank, occasioned by acts of the following character: (1) Permitting the president and cashier to discount notes from the funds of the bank, without the assent and intervention of five directors, as required by the rules and regulations of the bank; (2) Permitting purchases to be made of the stock of the bank out of the funds of the bank by the president and cashier, at a rate above the known true value thereof, or allowing them to take and use the money of the bank, contrary to the rules and regulations thereof; (3) Not opposing an illegal measure of the board of directors to discharge the cashier and his sureties from the responsibility on the official bond of the former.[2] How far similar doctrines will be adopted in Courts sitting under the jurisprudence of the common law, remains for future discussion in those Courts, as I am not aware that the question has

[1] Percy *v.* Millaudon, 20 Martin, R. 68, 73, 74, 75; Old Code of Louisiana (1809), p. 124, art. 17.

[2] Percy *v.* Millaudon, 20 Martin, R. 68, 79, 80, 81, 92.

as yet been directly litigated therein. But there can be little doubt that these doctrines are just conclusions from the general law of mandates.

§ 187. It may not be unfit, at the close of this discussion on the point of the mandatary's responsibility for gross negligence only, to remark, that the Scottish law has deserted the Roman doctrine on this subject, and holds the mandatary liable only for actual intromissions, and misfeasances, and for such diligence as he employs in his own affairs.[1] It will probably be found, that the Spanish law also has adopted an equally reasonable rule.[2]

§ 188. The general rule, that a mandatary is responsible for gross negligence only, applies solely to cases where he is in the actual performance of some act or duty intrusted to him in regard to the property. For if he violates his trust by a misuser of the property, or he does any other act inconsistent with his contract, or in fraud of it, he will clearly be liable for all losses and injuries resulting therefrom. He is not bound to suggest wise precautions against accident or loss; but he is not at liberty to expose the property to injury or loss by hazards inconsistent with his duty.[3] And in cases of misuser, especially such misuser as amounts to evidence of a conversion, it is, perhaps, strictly true, that every subsequent loss and injury, whether it be by accident or otherwise, will be at the risk of the mandatary.[4] This is certainly the rule of the civil law; and it has been incorporated into many, and, perhaps, into all the systems of foreign law derived from it.[5]

§ 189. There is a class of mandates arising in the Roman

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[1] Ersk. Inst. B. 3, tit. 3, § 36, 37; 1 Bell, Comm. § 411, 4th edit.; 1 Bell, Comm. p. 481, 5th edit.; 1 Stair, Inst. B. 1, tit. 12, § 10.

[2] Hodge's Heirs *v.* Durnford, 13 Martin, R. 100, 125, 126; Percy *v.* Millaudon, 20 Martin, R. 68, 77.

[3] Jones on Bailm. 101, 114, 115, 116.

[4] De Tollenere *v.* Fuller, 1 So. Car. Const. R. 121; Ulmer *v.* Ulmer, 2 Nott & McCord, 489; Catlin *v.* Bell, 4 Camp. 183; 2 Kent, Comm. Lect. 40, p. 572. 4th edit.; Post, § 413 a, § 413 b, § 413 c, § 413 d, § 414.

[5] Pothier, Contrat de Mandat, n. 51; Ersk. Inst. B. 3, tit. 3, § 37; Merlin, Repert. Mandat, § 2; Pothier, Pand. Lib. 17, tit. 1, n. 28, 29; Vinn. ad Inst. Lib. 3, tit. 27, § 8.

law, which does not seem to have any place in our law, at least, not under the some appellation. This class arises under what is called the *quasi contract* of *Negotiorum Gestor*, where a party spontaneously, and without the knowledge or consent of the owner, intermeddles with his property, as to do work on it, or to carry it to another place, &c. In cases of this sort, as he acts wholly without authority, there can, strictly speaking, be no contract. But the Roman law raises a *quasi* mandate, by implication, for the benefit of the owner, in many of such cases.[1] Nor is an implication of this sort wholly unknown to the common law, where there has been a subsequent ratification of the acts by the owner; and sometimes, where unauthorized acts are done, positive presumptions are made by law for the benefit of particular parties. Thus, if a stranger enters upon a minor's lands, and takes the profits, the law will, in many cases, oblige him to account to the minor for the profits, as his bailiff; for it will be presumed, that he entered to take them in trust for the infant.[2]

§ 189 *a*. As the *Negotiorum Gestor* interferes without any actual mandate, there is good reason for requiring him to exert the requisite skill and knowledge to accomplish the object or business which he undertakes; to do every thing which is incident to or dependent upon that object or business; and to finish whatever he has begun.[3] The Roman law says: *Qui absentis negotia gerere inchoavit, neque enim impune peritura, deseret; suscepisset enim fortassis alius, si is non cœpisset; voluntatis est enim suscipere mandatum, necessitatis consummare.*[4] Without such an obligation, every man in the community would be at the mercy of ignorant and officious friends.[5] And hence, the proper rule would seem to be, that he should

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[1] Pothier, Appendice du Quasi Contrat, Negot. Gest. Appendice Contrat de Mandat, n. 167, &c.

[2] 1 Dane, Abridg. ch. 8, art. 2, § 10; 1 Bac. Abridg. *Account;* 1 Com. Dig. *Accompt*, A. 3; Co. Litt. 89 b, 90 a; 1 Story on Eq. Jurisp. § 51.

[3] Hodge's Heirs *v.* Durnford, 13 Martin, R. 100, 124.

[4] Dig. Lib. 13, tit. 6, l. 17, § 3.

[5] Hodge's Heirs *v.* Durnford, 13 Martin, R. 100, 124; Pothier, Contrat de Mandat, n. 200, 201; Dig. Lib. 3, tit. 5, l. 21, § 2; Pothier, Pand. Lib. 3, tit. 5, n. 41, 42; Bayon *v.* Prevot, Martin, R. 58, 65.

be responsible at least for ordinary skill and ordinary diligence; if, indeed, he might not be subjected, in some cases, to a severer rule, and be deemed to act at his peril, and to be accordingly responsible for slight faults or neglects.[1] Pothier holds, that the *Negotiorum Gestor* is generally bound to the same degree of diligence and attention as a common mandatary; that is to say, that he is bound to accomplish and finish the business or affair which he undertakes; to render an account of his doings therein to the principal;[2] to apply the same degree of diligence and attention to it as he does to his own; and that, like a mandatary, he is liable sometimes for ordinary negligence, and sometimes for slight negligence, according to the nature of his undertaking.[3] But he holds, that the *Negotiorum Gestor* is sometimes bound to a higher degree of diligence than a mandatary; for in respect to common affairs, in which it is sufficient for a mandatary to exercise common diligence, the *Negotiorum Gestor* is sometimes bound to exercise the utmost possible diligence, and bound for the slightest negligence; as, for example, when he fails to bring to his undertaking the same degree of diligence which persons of more capacity and diligence than himself would bring to accomplish it.[4] Nay, Pothier insists, that he is sometimes responsible even for accidents; as when he undertakes to engage in some business which the principal has not been accustomed to do, and a loss occurs to him thereby.[5] He deduces these conclusions, as the just results also of the Roman law. In that law the general rule is: *Si negotia absentis et ignorantis geras, et culpam et dolum præstare debes.*[6] And it is not sufficient in all cases, that he applies the same diligence as he does in his own affairs. *Quo casu ad exactissimam quisque diligentiam*

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[1] Jones on Bailm. 49; Dig. Lib. 3, tit. 5, l. 3, § 9; Pothier, Pand. Lib. 3, tit. 5, n. 52; Pothier, Contrat de Mandat, n. 211; Bayon *v.* Prevot, 4 Martin, R. 58, 65.

[2] Pothier, Contrat de Mandat, n. 200, 201, 202, 212.

[3] Pothier, Contrat de Mandat, n. 37, 46, 47, 48, 208; Ante, § 174.

[4] Pothier, Contrat de Mandat, n. 209.

[5] Pothier, Contrat de Mandat, n. 210.

[6] Dig. Lib. 3, tit. 5, l. 11; Pothier, Pand. Lib. 3, tit. 5, n. 51.

compellitur reddere rationem; nec sufficit talem diligentiam adhibere, qualem suis rebus adhibere solet, si modo alius diligentior eo commodius administraturus esset negotia.[1] So, where he engages in new business to which the principal is not accustomed, he is liable; for it is treated as an improper act. *Culpa est, immiscere se rei ad se non pertinenti.*[2] Labeo, however, thought (and Pothier agrees with him), that where a friend interferes in a case of seeming necessity for the principal, as to prevent his goods from being sold, he is not responsible, except for bad faith or fraud. *Interdum in Negotiorum Gestorum actione Labeo scribit, dolum solummodo versari. Nam, si affectione coactus, ne bona mea distrahantur, negotiis te meis obtuleris, æquissimum esse, dolum duntaxat te præstare.*[3]

§ 189 *b*. The law of Louisiana has generally adopted the same rules on the subject of the rights and duties of the *Negotiorum Gestor*, as the civil law. The Civil Code declares, that, when a man undertakes, of his own accord, to manage the affairs of another, whether the owner be acquainted with the undertaking, or ignorant of it, the person assuming the agency contracts the tacit engagement to continue it, and to complete it, until the owner shall be in a condition to attend to it himself. He assumes, also, the payment of the expenses attending the business. He incurs all the obligations which would result from an express agency, with which he might have been invested by the proprietor. In managing the business, he is obliged to use all the care of a prudent administrator or father of a family. Yet, where circumstances of friendship or of necessity have induced a person to undertake the management, that consideration may authorize the judge to mitigate the damages, which may arise from the faults or negligence of the manager.[4] So that, according to this law, a *Negotiorum Ges-*

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[1] Inst. Lib. 3, tit. 28, § 1.

[2] Dig. Lib. 50, tit. 17, l. 36; Pothier, Pand. Lib. 3, tit. 5, n. 52.

[3] Dig. Lib. 3, tit. 5, l. 3, § 9; Pothier, Pand. Lib. 3, tit. 5, n. 52.

[4] Code of Louisiana of 1825, art. 2275; Bayon *v.* Prevot, 4 Martin, R. 58, 65; Hodges's Heirs *v.* Durnford, 13 Martin, R. 100, 124. The recent edition of this code, by Wheelock S. Upton, Esq. (in 1838), is incomparably the best, and contains exceedingly valuable, though brief commentaries, drawn from the

tor is bound to observe the ordinary diligence and care which may be expected from the prudent master of a family. Whoever wishes for more exact information upon this title of the Roman law (*Negotiorum Gestorum*), will find it treated with uncommon fulness and accuracy by the learning of Pothier.[1] But it is so remote from the jurisprudence of the common law, that it does not seem important to review it in this place, with its various distinctions.

§ 190. There is a case which has undergone a decision in our law, which approaches very near to that of a *Negotiorum Gestor*. A master of a ship had gratuitously taken charge of and received on board of his vessel, a box containing doubloons and other valuables, belonging to a passenger, who was to have worked his passage, but was accidentally left behind. During the voyage the master opened the box in the presence of the passengers, to ascertain its contents, and whether there were contraband goods in it or not; and he took out the contents and lodged them in a bag in his own chest in his cabin, where his own valuables were kept. After his arrival in port, the bag was missing. The master was held responsible for the loss, on the ground, that he had imposed upon himself the duty of carefully guarding against all perils to which the property was exposed by means of the alteration in the place of custody, although, as a bailee without hire, he might not otherwise have been bound to take more than a prudent care of them; and that he had been guilty of negligence in guarding the goods.[2]

§ 191. We come, in the next place, to the implied obligation of the mandatary to render an account. And here the Roman law, the law of France, and of other modern nations, whose jurisprudence has been derived from that source, and the com-

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State decisions and from foreign authorities. It must be invaluable to students, and I take this occasion to say, that I have constantly referred to this edition in the present volume.

[1] Pothier, Contrat de Mandat, n. 167 to 228.

[2] Nelson *v.* Macintosh, 1 Stark. R. 237. The case stated by Lord Ellenborough, in Drake *v.* Shorter, 4 Esp. R. 165, and cited post, § 214, seems to approach still more nearly to that of a *Negotiorum Gestor*.

mon law, generally recognize the same doctrine, and proceed *pari passu*. The mandatary is bound to render to the mandator, upon request, a full account of his proceedings; to show that the trust has been duly performed; or, if ill performed. to offer a justification or legal excuse for such ill performance, If the property is to be restored to the bailor after the work is done, then such restitution is included in the mandatary's duties. If by his fraud, or gross negligence, or misuser, the mandatary has made himself liable in damages, he must pay these damages.[1] Of course the form and mode in which the remedies of the bailor are to be enforced, in case of any fault committed by the mandatary, for which he is responsible, will depend upon the municipal law of the particular country. In the Roman law, and the foreign law derived from it, the remedy would ordinarily be the *Actio mandati directa*, which is one of the nominate forms of that law.[2] In the common law it would be either an action founded on the contract, such as an action of assumpsit, or an action founded on the tort, such as an action on the case for misfeasance, or negligence, or conversion.

§ 192. It has been asked, whether a general mandatary can recoup or set off in damages the benefits which the mandator has received on one mandate, against the losses which he has sustained on another. Pothier decides the question in the same manner as, it is presumed, the common law would decide it, that he cannot.[3] But if, upon a mandate of a package of goods, a part be injured by the inexcusable negligence of the mandatary, and extraordinary profit be made upon the rest by his extraordinary diligence, it might deserve consideration, whether the damage should exceed what, upon an average of the whole, might be deemed the fair profit, which would have accrued, if the mandatary had used ordinary care and diligence throughout.

§ 193. Of course, in rendering an account, the mandatary

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[1] Pothier, Contrat de Mandat, n. 61; Pothier, Pand. Lib. 17, tit. 1, n. 25 to 30, 36.

[2] Pothier, Contrat de Mandat, n. 61 to 66; Pothier, Pand. Lib. 17, tit. 1, n. 23 to 41.

[3] Pothier, Contrat de Mandat, n. 52; Story on Agency, § 223; 1 Livermore on Agency, p. 394.

is entitled to deduct and receive an allowance for all expenses and charges, to which he has been necessarily subjected in performing the trust. But the consideration of this subject will fall more properly under another head.[1]

§ 194. In making restitution of the property bailed, when that constitutes a part of the duty of the mandatary, he is not only bound to restore the thing specially, but also the increments, earnings, and gains derived from it.[2] If animals are to be restored, their young also belong to the bailor. If gold or silver coins have been delivered, to be made interest of, and to be specifically returned, the interest is to be accounted for as well as the principal. If a vehicle has been delivered to be let for hire, the mandatary must account for the hire earned, as well as for the vehicle. These principles are founded on the Roman law, where the general rule is laid down: *Ex mandato, apud eum, qui mandatum suscepit, nihil remanere oportet;*[3] and they seem of general applicability in the common law.

§ 195. If there are joint mandataries, each is responsible for the whole *in solido*. If there are joint mandators, the account must be rendered to them all jointly. But these are points of pleading and practice in the common law, and more properly belong to a general treatise on the proper parties to suits, than to one on a single branch of contracts.[4]

§ 196. We come next to the consideration of the obligations of the mandator, arising from the contract of mandate. And here little more remains, than to state the doctrines of the Roman and Continental law, the common law having, as yet, furnished no decisions which go to the point. What is here stated can therefore be relied on only as the reasoning of learned minds on a similar subject, which, in the absence of all positive adjudications, may not be unfit to be submitted to the consid-

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[1] Post, § 196, 197 to 200.

[2] Pothier, Contrat de Mandat, n. 58, 59; 2 Kent, Comm. Lect. 40, p. 566, 567, 4th edit.; Ante, § 99.

[3] Dig. Lib. 17, tit. 1, l. 20; Pothier, Pand. Lib. 17, tit. 1, n. 31 to 34.

[4] Jones on Bailm. 51, 52; Pothier, Contrat de Mandat, n. 63; 1 Domat, B. 1, tit. 13, § 2, art. 5; Pothier, Pand. Lib. 17, tit. 1, n. 24; Ersk. Inst. B. 3, tit. 3, § 34; 2 Kent, Comm. Lect. 40, p. 567, 4th edit.; Ante, § 114, 115, 116.

eration of the professors of the common law. The mandator, then, contracts to reimburse the mandatary for all expenses and charges, reasonably incurred in the execution of the mandate, and also to indemnify him for his liability on all contracts, which arise incidentally in the proper discharge of his duty. This is called, in the Roman law, *Obligatio mandati contraria*, because it is reciprocal, and incidental to that of the mandatary, which is deemed the principal obligation, and is therefore called, *Obligatio mandati directa*.[1]

§ 197. First. In relation to expenses. It is obvious that, if the bailor contemplates any thing to be done on his goods by which the mandatary must or may incur expenses, he is bound to reimburse him; for it can never be presumed that a gratuitous trust is designed to be a burden on the mandatary. Thus, if a party requests a friend to receive his goods, and enter them at the custom-house, and pay the duties thereon, an implied obligation arises to reimburse him the amount of the duties, and the other incidental expenses and charges upon the entry. If a party requests a friend to carry goods for him in a stage-coach to another town, for which goods carriage-hire is usually paid, a like duty to pay the bill is presumed. And even if the expenses should exceed what the owner himself would have paid, still, if they are such as were reasonably incurred, he is liable therefor; and under particular circumstances he may also be compellable to pay interest thereon.[2] It will make no difference, that the mandator has not derived the expected benefit from the execution of the trust, if it is not occasioned by the default of the mandatary.[3] It follows of course from what has been said, that, if the expenses are unnecessary or extravagant, or arise from the gross negligence or fraud of the mandatary, or from his exceeding his authority, they are not reimbursible.[4]

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[1] Pothier, Contrat de Mandat, n. 68, 82.

[2] 1 Domat, B. 1, tit. 15, § 2, art. 2, 3; Dig. Lib. 17, tit. 1, l. 10, § 9; Id. l. 27, § 4; Id. l. 12, § 9; Pothier, Contrat de Mandat, n. 69, 78, 79; Pothier, Pand. Lib. 17, tit. 1, n. 53, 54, 55, 56, 58, 59.

[3] 1 Domat, B. 1, tit. 15, § 2, art. 2; Cod. Lib. 4, tit. 35, l. 4; Code Civil of France, art. 1999; Pothier, Pand. Lib. 17, tit. 1, n. 53, 54, 59, 63, 64, 67, 68, 69, 70, 79.

[4] 1 Domat, B. 1, tit. 15, § 2, art. 2; Pothier, Contrat de Mandat, n. 3, 78, 79;

§ 198. Secondly. As to indemnity for incidental contracts made by the mandatary. This is obviously founded on the same general principles of justice, and the presumed intention of the parties, as the reimbursement of expenses. If A requests B to take a package of goods with him as a favor in a ship, in which B is bound from Liverpool to Boston, and B engages with the master to pay the freight thereof, A is bound to indemnify B for entering into the contract. So, if B in the same case gives a bond at the custom-house for the duties, A is bound to indemnify him therefor. So, if A requests B to carry his chaise to Boston, and procure it to be repaired there by some proper artisan, and B contracts to pay the repairs, A is bound to indemnify him. But in all such cases the contract must be reasonably and properly entered into by the mandatary; and no presumption must arise from the circumstances, that no indemnity is expected or intended between the parties. For the parties are at liberty to waive such compensation, or to decline entering into a stipulation of indemnity. If a father says to his son, I will take your chaise to Boston, and have it repaired at my own expense, no contract to indemnify the father arises. But if the right to compensation or indemnity exists, then it is not material, that by some accident the mandator has not derived the contemplated benefit from the act; as if his chaise, sent to be repaired, is burnt up, or is accidentally destroyed, before it is returned to him.[1]

§ 199. It follows from the like considerations, that all contracts made with third persons by the mandatary in the execution of his agency, and within the scope of his authority, are binding upon the bailor, and must be fulfilled by him, when he is made a contracting party. Pothier has under this head discussed many questions as to the extent, scope, and limits of the agency, and how far the acts of the agent bind the bailor.[2] But discussions of this nature more properly fall, in our law,

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Pothier, Pand. Lib. 17, tit. 1, n. 53 to 69; Pellatier *v.* Roumage, 2 Miller's Louis. R. 528.

[1] Pothier, Contrat de Mandat, n. 80, 81; Dig. Lib. 17, tit. 1, l. 45.

[2] Pothier, Contrat de Mandat, n. 90 to 100.

under the general head of agency, than under the particular contract of bailment.

§ 200. Thirdly. Another question is, how far the mandator is bound to indemnify the mandatary for any losses or injuries sustained by him in the execution of the trust. Now, upon this subject, the Roman law and the foreign law contain some very nice distinctions. The general rule seems to be, that the mandator is bound to indemnify the mandatary against all losses and injuries, the proximate cause of which can be directly traced to the execution of the mandate; but not for losses and injuries of which the mandate was merely the occasion.[1] Thus, in the Roman law it is said, that if A is plundered by a slave, whom he has been requested by B to buy and bring to him, B is responsible for the loss, although he was ignorant that the slave was a thief, if the loss was not occasioned by any default of the mandatary.[2] Pothier says, that the distinction between the cause and the occasion of a loss is most important to be attended to; and he puts several cases to illustrate it, some of which he borrows from the Roman law.[3] Some of these cases furnish matter of much nice and curious reasoning, and deserve the attention of critical jurists. But it will be sufficient to illustrate his meaning by a few obvious cases. If A undertakes to carry money gratuitously for B to another place, and the journey is undertaken wholly on B's account, and A is robbed of his own money, as well as of B's, on the journey, there the loss must be borne by B; for the mandate is the cause of the loss. So if A were going the same journey by another road, less infested by robbers, and he takes a particular road solely for B's accommodation, there B must bear the loss. But if A were making the same journey on his own account, or were bound to the same place, and there was no choice of roads, or one was not more dangerous than another, there the loss must be borne

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[1] Pothier, Pand. Lib. 17, tit. 1, n. 61.

[2] Dig. Lib. 47, tit. 2, l. 61, § 5; Pothier, Contrat de Mandat, n. 75; Pothier, Pand. Lib. 17, tit. 1, n. 60, 61.

[3] Pothier, Contrat de Mandat, n. 75, 76, 77; Pothier, Pand. Lib. 17, tit. 1, n. 61, 62.

by A; for there the mandate is not the cause, but the occasion, of the loss. So, in a case of shipwreck, if it happens in passing a river, at a place which the mandatary is accustomed to pass on his own business, there it cannot be said that the execution of the mandate, with which he is intrusted at the same time, is the cause of the loss which is sustained by the shipwreck. It is but the occasion. *Hæc magis casibus, quam mandato, imputari oportet.*[1] But if the loss happens in the course of a navigation, to the risk of which the mandatary is exposed solely in the execution of the trust, and to which he would not otherwise be exposed, there the mandate is to be considered the cause of the loss. But even in such cases, the loss of such goods or things only as are indispensable for the voyage or journey are to be repaid, and not of such as are carried for the mere pleasure or profit of the mandatary.[2]

§ 201. How far any of these doctrines are or would be adopted into our law, cannot be satisfactorily answered by adjudged cases; for none can be found. Doctor Paley has, however, discussed the same points; and it seems fit, in the absence of all authorities, to lay before the reader the opinion of this eminent divine. "The agent," says he, "may be a sufferer in his own person or property by the business he undertakes. As where one goes a journey for another, and lames his horse, or is hurt himself by a fall on the road; can the agent in such case claim a compensation for the misfortune? Unless the same be provided for by express stipulation, the agent is not entitled to any compensation from his employer on that account. For where the danger is not foreseen, there can be no reason to believe that the employer engaged to indemnify the agent against it. Still less, where it is foreseen; for whoever knowingly undertakes a dangerous employment, in common construction, takes upon himself the danger and the consequences. As where a fireman undertakes for a reward to rescue a box of writings from the flames, or a sailor to bring off

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[1] Pothier, Contrat de Mandat, n. 76; Dig. Lib. 1, tit. 1, 7, l. 26, § 6.

[2] Pothier, Contrat de Mandat, n. 75, 76, 77; 1 Domat, B. 1, tit. 15, § 2, art. 6; Code Civil of France, B. 3, tit. 13, art 2000. See also, Heinec. Pand. Lib. 17, § 234.

a passenger from a ship in a storm."[1] In such a case, however, one would incline to say with Pothier, that, if there is no legal obligation to indemnify, there is a strong moral claim upon the party from propriety and humanity to do so.[2]

§ 202. We next come to the inquiry, in what manner the contract of mandate may be dissolved. (1) And in the first place, it may at the common law be dissolved by the renunciation of the mandatary, at any time before he has entered upon its execution; although the rule of the Roman and foreign law is (as we have seen), under some circumstances, different.[3] But in this case, as indeed in all others where the contract is dissolved before the act is done, which the parties intended, the property bailed is to be restored to the mandator.[4] (2) In the second place, it is, or may be, dissolved by the death of the mandatary; for being founded in personal confidence, it is not presumed to pass to his representatives, unless there is some special stipulation to that effect.[5] But this principally applies to cases where the mandate remains wholly unexecuted; for if it be in part executed, there may, in some cases, arise a personal obligation on the part of the representatives to complete it.[6] As, for example, if A has bought books for B at his request, to be sent to B at Washington, and the books are bought, and before they are sent to Washington A dies, the representative of A is bound to send them. At least, such is the doctrine of the Roman and foreign law.[7]

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[1] Paley's Moral Phil. B. 3, P. 1, ch. 12.

[2] Pothier, Contrat de Mandat, n. 76.

[3] Ante, § 164, 165; Post, § 208; Story on Agency, § 462, 478, 479; Pothier, Pand. Lib. 17, tit. 1, n. 80; Pothier, Contrat de Mandat, n. 38, 44; 2 Kent, Comm. Lect. 40, p. 569, 570, 571; Code of Louisiana of 1825, art. 3000; 1 Bell, Comm. § 413, 4th edit.; 1 Bell, Comm. p. 488, 5th edit.

[4] See also, Pothier, Contrat de Mandat, n. 38 to 46.

[5] 2 Kent, Comm. Lect. 41, p. 643, 644, 4th edit.; Story on Agency, § 488, 491, 492, 493, 494; Pothier, Contrat de Mandat, n. 100, 101; Code of Louisiana of 1825, art. 2996; Pothier, Contrat de Mandat, n. 80; Ersk. Inst. B. 3, tit. 3, § 40.

[6] 2 Kent, Comm. Lect. 41, p. 643, 644, 4th edit. See Story on Agency, § 465, 466.

[7] Pothier, Contrat de Mandat, n. 101; Pothier, Pand. Lib. 17, tit. 1, n. 80; 2 Kent, Comm. Lect. 41, p. 643, 644, 4th edit.; Ersk. Inst. B. 3, tit. 3, § 40.

If there are joint mandataries, the death of one of them dissolves the contract as to all, according to the French law.[1] At the common law the rule will be the same, whenever the bailment is of a nature which requires the united advice, confidence, and skill of all, and may, therefore, be deemed a joint personal trust to all. The general rule of the common law is, that an authority to two cannot be executed, except by both; and if one refuse, or die, the authority is gone; for in such cases the authority is construed strictly. Therefore, generally, an authority given to A, B, and C, to sell a thing, is gone by the death of either of them.[2] But, suppose goods are sent to a partnership at Boston, to be by them sent to New Orleans, and they gratuitously undertake to forward them, and then one of the partners dies; is the mandate at an end, it being an act in its own nature requiring no peculiar personal confidence or skill? Suppose goods sent to a partnership to sell gratis, and one partner dies; is the power to sell necessarily gone, or may it be construed, by implication, to survive? These questions are put merely for consideration; as they do not appear to have been decided by any direct authority.[3] But where the authority is joint and several, there the death of one mandatary does not revoke the authority of the others to act.[4]

§ 203. The death of the mandator, in like manner, puts an end to the contract; the rule of the common law being, on this point, coincident with that of the Roman law: *Mandatum, re integrâ, domini morte finitur.*[5] And in like manner, if a

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[1] Id. n. 102; 2 Kent, Comm. Lect. 41, p. 643, 644, 646, 4th edit.

[2] See Co. Litt. 112 b; Id. 181 b; Comm. Dig. *Attorney*, C. 8; Bac. Abridg. *Authority*, C.; 2 Kent, Comm. Lect. 41, p. 643, 644, 646, 4th edit.; Story on Agency, § 488.

[3] See 2 Kent, Comm. Lect. 41, p. 643, 644, 646, 4th edit.; Wells *v.* Ross, 7 Taunt. R. 403; Story on Agency, § 488 to 500.

[4] Pothier, Contrat de Mandat, n. 102, 109.

[5] Cod. Lib. 4, tit. 35, l. 15; Hunt *v.* Rousmanier's Adm'r, 2 Mason, R. 342; s. c. 8 Wheat. R. 174; 2 Kent, Comm. Lect. 41, p. 643, 644, 646, 4th edit.; 1 Domat, B. 1, tit. 15, § 4, art. 6, 7, 8; Pothier, Contrat de Mandat, n. 103; Story on Agency, § 469; Pothier, Pand. Lib. 17, tit. 1, n. 76; Ersk. Inst. B. 3, tit. 3, § 40, 41; Code of Louisiana (1825), art. 2996; 1 Bell, Comm. § 413,

power of substitution be allowed by the original mandate, the substitution ceases with the death of the mandatary who made it, unless, indeed, the nature of the substitution provided for be such that the substitute becomes the direct agent of the mandator, in lieu of the mandatary.[1]

§ 204. But although an unexecuted mandate ceases with the death of the mandator, yet, if it is executed in part at that time, it is binding to that extent, and his representatives must indemnify the mandatary.[2] And the civil law goes further, and provides, that, if the mandatary in good faith acts after the death of the mandator, and in ignorance of that fact, his acts are binding upon the representatives of the mandator.[3] And if the mandate be of a nature which admits of no delay, the mandatary may, in order to prevent a positive loss or injury, even with a knowledge of the death of the mandator, proceed to execute it, if there be no time to give notice to his representatives to act.[4] As, if fruit is ordered to be sold in a foreign port, and it would perish before the proper orders from the administrators could be obtained, the mandatary would be justified in making a sale. In such a case the common law may not, perhaps, differ; since factors are not obliged to sell goods in the name of their principal, as mere agents; but they are clothed with an implied authority to sell them in their own names, as persons having a general right of disposal thereof.[5]

§ 205. The common law, however, is, in some respects, different from the Roman law on this subject; for although by that law an authority, coupled with an interest in the thing, may survive, yet a mere naked power or authority ordinarily

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4th edit.; 1 Bell, Comm. p. 488, 5th edit. See Harper *v.* Little, 2 Greenl. Rep. 14.

[1] Pothier, Contrat de Mandat, n. 105; Story on Agency, § 469, 490.

[2] Pothier, Contrat de Mandat, n. 101; Code of Louisiana (1825), art. 3001.

[3] Pothier, Contrat de Mandat, n. 106; Dig. Lib. 27, tit. 1, l. 26, 58; Pothier, Pand. Lib. 17, tit. 1, n. 77; 1 Domat, B. 1, tit. 15, § 4, art. 7; Code Civil of France, art. 2008; Code of Louisiana (1825), art. 3001; Ersk. Inst. B. 3, tit. 3, § 40, 41.

[4] Pothier, Contrat de Mandat, n. 107; Ersk. Inst. B. 3, tit. 3, § 40, 41.

[5] Ibid.; Story on Agency, § 492.

dies with the party giving it.[1] And there is no exception, even although the mandatary is ignorant of the death of the party.[2] This seems to be a very rigid rule; but it flows naturally from the doctrine, that the power to be executed can exist only while the party, in whose name it is to be done, is in existence. A dead man can do no act. Whether the civil law has not introduced a more equitable principle, is a point fairly open for consideration, and upon which much reasoning may be urged on both sides.[3]

§ 206. In the third place, the contract of mandate may be dissolved by a change of the state of the parties. As, if either party, being a female, marries before the execution of the mandate; or if either party becomes insane, or *non compos mentis*, or is put under guardianship, the mandate is dissolved.[4] Pothier puts the case of the marriage of the mandator only.[5] But the same rule would seem, ordinarily, to apply to the marriage of the mandatary; since her husband's rights may be affected by her conduct.[6] The Roman law treats all these supervening disabilities as good causes of dissolution, subject, however, to the same exceptions as it recognizes in case of death.[7] The common law, in like manner, deems the marriage of a woman to be a revocation of the antecedent authorities conferred by her on other persons; for her acts may be to the prejudice of the husband's rights.[8] But it does not appear to have ingrafted the same exceptions upon the rule as the Roman law.

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[1] Story on Agency, § 488, 489, 490; Hunt *v.* Rousmanier's Adm'r, 8 Wheat. R. 174; s. c. 2 Mason, R. 244.

[2] 2 Kent, Comm. Lect. 41, p. 643, 644, 4th edit.; The King *v.* Corporation of Bedford Level, 6 East, R. 356; Hunt *v.* Rousmanier's Adm'r, 2 Mason, R. 244; s. c. 8 Wheat. R. 174; Willes, R. 101, 103; 2 Ves. & B. 51; Wallace *v.* Cook, 5 Esp. R. 118; Story on Agency, § 488, 489, 490.

[3] See Story on Agency, § 488 to 500.

[4] Ibid. § 481.

[5] Pothier, Contrat de Mandat, n. 111; 1 Bell, Comm. § 413, 4th edit.; 1 Bell, Comm. p. 488, 489, 5th edit.

[6] See Story on Agency, § 481; 2 Kent, Comm. Lect. 41, p. 645, 4th edit.

[7] Pothier, Contrat de Mandat, n. 111.

[8] 2 Roper, *Husband and Wife*, 69, 73; Salk. 117; Bac. Abridg. *Baron and Feme*, E.; 2 Kent, Comm. Lect. 41, p. 645, 4th edit.; Story on Agency, § 481.

§ 207. The contract of mandate may also cease by a revocation of the authority, either by operation of law, or by the act of the mandator.[1] It ceases by operation of law, when the power of the mandator ceases over the subject-matter. As, if he be a guardian, it ceases as to his ward's property by the termination of the guardianship.[2] So, if he sells the property, it ceases upon the sale, if it is made known to the mandatary.[3]

§ 208. By the Roman law the contract of mandate also ceases by the revocation of the authority by the mandator himself. In general, every mandator may revoke a mere authority at his own will. *Extinctum est mandatum, finitâ voluntate.*[4] And this revocation may be express, or it may be implied. The latter is quite as effectual as the former, if it be clearly manifested. As if a mandator appoints another person to do the same act, this is an implied revocation.[5] So an authority to act during the absence of a party is revoked by implication by his return, although it is not expressly limited to such return by its terms, if the intention be clear.[6] But, in such cases, the revocation is not complete, until notice is given to the mandatary, whose acts still bind until such notice.[7] But if the mandate is partly executed at the time, to that extent it is obligatory. Nay, by the Roman law, in such a case, the mandatary may, notwithstanding the revocation, go on to do what-

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[1] Pothier, Pand. Lib. 17, tit. 1, n. 79; Pothier, Contrat de Mandat, n. 112, 113; 2 Kent, Comm. Lect 41, p. 643 to 646, 4th edit.; 1 Bell, Comm. § 413, 4th edit.; 1 Bell, Comm. p. 488, 489, 5th edit.; Ersk. Inst. B. 3, tit. 3, § 40, 41; Story on Agency, § 463 to 476.

[2] Pothier, Contrat de Mandat, n. 112; Story on Agency, § 500.

[3] 7 Ves. jr. 276.

[4] Dig. Lib. 17, tit. 1, l. 12, § 16; Code Civil of France, art. 2003 to 2008; Pothier, Pand. Lib. 17, tit. 1, n. 79; Pothier, Contrat de Mandat, n. 113; 1 Bell, Comm. § 413, 4th edit.; 1 Bell, Comm. p. 489, 5th edit.

[5] Copeland *v.* The Merc. Insur. Co. 6 Pick. R. 198; Pothier, Contrat de Mandat, n. 113, 114, 115.

[6] Pothier, Contrat de Mandat, n. 119.

[7] Id. § 120; Salt *v.* Field, 5 Term Rep. 213; Bowerbank *v.* Morris, Wallace, R. 126; Morgan *v.* Stell, 5 Binn. R. 316; Code Civil of France, art. 2005; Code of Louisiana (1825), art. 2996, 2997; Story on Agency, § 470.

ever necessarily follows from the antecedent part of the execution thereof.[1]

§ 209. The common law, in many of these respects, coincides with the civil law. In general, the party giving an authority is entitled to revoke it. But if it is given as a part of a security, as if a letter of attorney is given to collect a debt, as a security for money advanced, it is irrevocable by the party, although it is revoked by his death.[2]

§ 210. In cases of mandates, where the thing is to be delivered to a third person, if the latter has no vested interest in it, the bailor may revoke the bailment at any time.[3] And whenever a revocation takes place by the act of the party, it ordinarily suspends, by the common law, all future operations of the mandatary, under the power previously confided to him.[4]

§ 211. Bankruptcy of the mandator, also, generally operates as a revocation of the authority of the mandatary by the common law, as well as by the foreign law.[5] Bankruptcy of the mandatary is, in like manner, a revocation by the foreign law.[6] But, at the common law, it is not necessarily a revocation of the mandate in all cases. Where the mandatary is to execute a mere authority, it seems not to be revoked, but where the act to be done may involve the receipt or expenditure of money on account of the mandator, it may, perhaps, be otherwise.[7]

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[1] Pothier, Contrat de Mandat, n. 122; 2 Kent, Comm. Lect. 41, p. 644, 4th edit.; Story on Agency, § 468 to 474.

[2] Hunt *v.* Rousmanier's Adm'r, 2 Mason, R. 342; s. c. 8 Wheat. R. 174; Walsh *v.* Whitcomb, 2 Esp. R. 565; Bromley *v.* Holland, 7 Ves. R. 28; Lepard *v.* Vernon, 2 Ves. & B. R. 51; Watson *v.* King, 1 Stark. R. 121; s. c. 4 Camp. R. 272; Story on Agency, § 488, 489.

[3] 1 Dane, Abr. ch. 12, art. 4, § 10; 2 Story on Eq. Jurisp. § 1045, 1046.

[4] Story on Agency, § 466, 467, 468, 470.

[5] See Pothier, Contrat de Mandat, n. 111, 112; Code Civil of France, art. 2003; Code of Louisiana (1825), art. 2996; 1 Bell, Comm. § 413, 4th edit.; 1 Bell, Comm. p. 488, 489, 5th edit.; Minett *v.* Forrester, 4 Taunt. R. 541; Parker *v.* Smith, 16 East, 382; 2 Kent, Comm. Lect. 41, p. 644, 645, 4th edit.; Story on Agency, § 482.

[6] Pothier, Contrat de Mandat, n. 120. The Scotch law, on the whole subject of revocation, seems a mere transcript from the civil law. Ersk. Inst. B. 3, tit. 3, § 40.

[7] Story on Agency, § 486.

§ 212. There still remain a few points to be considered, before we close the subject of mandates. One is, upon whom the burden of proof lies, in cases where the bailor sues the mandatary on the ground of gross negligence. In respect to different sorts of bailees, different rules, as to the burden of proof, seem to be adopted in the common law on this point.[1] The present remarks will, therefore, be confined to the case of mandataries.

§ 213. It may be proper to remark, that something may depend upon the form of the action, and upon the posture of the evidence at the trial, as well as upon the stage of the cause at which the question arises. It may possibly be different where a *primâ facie* case, to support an action of trover, is made out at the trial, from what it would be in an action of assumpsit, or an action of the case founded on negligence. In the latter actions, the plaintiff must make out his case *primâ facie*, as he charges it; in the former, he may rely on an apparent conversion, or on a demand and refusal of the property, and thus put the other side on the defence. But waiving all considerations of this sort, it seems a general principle of the common law, that every person is presumed to do his duty, until the contrary is established; and on this account, in many cases, the burden is on the plaintiff, to negative this presumption by appropriate proofs.[2] How far this principle ought to

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[1] Jones on Bailm. 96, 98; Bennett *v.* Mellor, 5 Term Rep. 276, per Buller, J.; Finucane *v.* Small, 1 Esp. R. 316; Murphy *v.* Staton, 3 Munf. R. 239; Bell *v.* Reed, 4 Binn. R. 127; 6 Johns. R. 160; Harris *v.* Packwood, 3 Taunt. R. 264; Marsh *v.* Horne, 5 Barn. & Cress. R. 322; Forward *v.* Pittard, 1 Term R. 33; Platt *v.* Hibbard, 7 Cowen, R. 497 and 500, note; Post, § 213 and note, § 278, 339, 410, 454, 529.

[2] Williams *v.* East India Company, 3 East, R. 192. In a recent case in New York, Beardslee *v.* Richardson, 11 Wend. R. 25, it was held that, where a mandatary had received a sealed letter, with money in it, to carry from New Orleans to New York, the plaintiff was not entitled to recover, without showing either that the letter had been opened by the mandatary, or had been lost by his gross negligence, or that, on a demand, he had refused to deliver it. If demanded, the mandatary would be bound to give some account of the loss, and to indemnify the plaintiff, unless he could show that the property was lost without gross negligence on his part. But suppose, when demanded, the mandatary should state, that he had not broken the seal, and that the letter was lost by

govern in cases of bailment generally, deserves consideration.[1] That gross negligence by a gratuitous bailee is a very reprehensible neglect of duty, will scarcely be doubted. And it was accordingly deemed infamous in the Roman law.[2] Under such circumstances, it may not be thought unreasonable, that the burden of proof of such negligence should be thrown upon the plaintiff.[3]

§ 214. A case of a somewhat anomalous character was once put by Lord Ellenborough, and deserves notice in this place. Suppose a chattel, as a boat, belonging to another person, be taken to do an act of charity (as to extinguish a fire), or to do an act of kindness to the party who is the owner of it (as to save his other property from the flames), and an injury or loss happens unintentionally to the thing in the use of it for this purpose; how far would the party be responsible to the owner for such loss or injury? Lord Ellenborough was of opinion, that he would not be responsible in any manner for it.[4]

§ 215. There are certain exceptions usually enumerated under the head of Mandates, in which the responsibility of the bailee for neglect is different from that which is ordinarily implied by law. Such are the cases of a special contract or engagement; an officious voluntary offer by the mandatary; or an interest accruing to both parties from the particular bailment.[5] These cases do not, however, properly constitute ex-

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accident, or stolen from him, and should narrate all the circumstances; the question would then arise, whether they ought not to be deemed a part of the case, so as to entitle the mandatary to the benefit of the statement at the trial, as a part of the res gestæ at the time of the demand and refusal. It would seem that he would be so entitled. Still, however, the jury would doubtless be at liberty to disbelieve the statement, or to find the mandatary guilty of gross negligence, if the circumstances did not, in their judgment, repel it. In Doorman *v.* Jenkins, 2 Adolph. & Ellis, R. 80, such evidence was admitted; and yet the jury found the mandatary guilty of gross negligence. The like rule would apply to depositaries and borrowers. See also, Post, § 278, 339, 410, 454, 529. See Clarke *v.* Spence, 10 Watts, R. 335.

[1] Ibid.

[2] Jones on Bailm. 62; Pothier, Contrat de Mandat, n. 65.

[3] Ante, § 213, note (1); Post, § 278, 339, 410, 454, 529; Beardslee *v.* Richardson, 11 Wend. R. 25. See Clarke *v.* Spence, 10 Watts, R. 335.

[4] Drake *v.* Shorter, 4 Esp. R. 165; Ante, § 190 and note.

[5] Jones on Bailm. 63.

ceptions from the general rule, but they rather furnish grounds for excluding its operation; and what has been already said respecting them, under the head of deposits, applies with equal force here, and needs not be repeated.[1]

§ 216. A case, falling practically under the last class of exceptions, deserves attention. A conversation took place between A and B relative to the purchase of a slave of A by B; and it was agreed between them, that B should have the slave for a particular price, if, on trial and keeping him, he liked him. B accordingly received the slave, and suffered him to go to a neighboring village the same evening, when the slave ran away. The question was whether this permission on the part of the bailee was such a negligence as rendered him liable to the bailor. The Court thought that it was not, any more than it would have been to suffer him to go on an errand for the bailee.[2] This case seems one of mutual interest, rather than one of gratuitous bailment.

§ 217. But suppose a slave should be put into the custody of a friend, to be carried in a vessel from one port to another, and he should run away during the voyage; would the friend be responsible, unless there had been gross negligence on his part, even if he did not take, as he might have done, greater precautions to prevent his escape? Looking to the analogy furnished by other cases, it would probably be held, that he would not be responsible for the loss.[3] And this is certainly the doctrine of the courts of Louisiana, in cases of escape of a slave from the custody of a *Negotiorum Gestor*, who is held responsible only for ordinary care and diligence.[4]

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[1] Ante, § 80, 81, 82. Mr. Chancellor Kent, in his Commentaries (2 Kent, Comm. Lect. 40, p. 572, 573), puts the case of a spontaneous and officious offer by a mandatary, in which he suggests, that he may be responsible for slight neglect. It appears to me, that there is great difficulty in maintaining that doctrine; and the learned author relies solely on Jones on Bailm. 48; Ante, § 80 to 82.

[2] De Fonclear *v.* Shottenkirk, 3 Johns. R. 170. See Post, § 577.

[3] Beverly *v.* Brooke, 2 Wheat. R. 100; Post, § 577.

[4] Bayon *v.* Prevot, 4 Martin, R. 65; Code of Louisiana (1825), art. 2274, 2275; Ante, § 189 b, and cases cited in Upton's edition of the Code of Louisiana (1825), art. 2275; Swigert *v.* Graham, 7 B. Munroe (Kentucky), R. 661.

§ 218. Here end these Commentaries on the subject of Mandates, a contract on which, Sir William Jones has remarked, actions are very uncommon, for a reason not extremely flattering to human nature; because it is very uncommon to undertake any office of trouble without compensation.[1] Perhaps a large survey of human life might have furnished a more charitable interpretation of this absence of litigation; first, because from the great facilities of a wide and cheap intercourse in modern times, there is the less reason to burden friends with the execution of such trusts; and secondly, because in cases of loss, there is an extreme reluctance, on the part of bailors, to make their friends the victims of a meritorious, although, it may be, a negligent kindness.

CHAPTER IV.

ON GRATUITOUS LOANS.

§ 219. THE next class of Bailments to be considered is that which, in the civil law, is called a COMMODATUM, and which, for the want of a more appropriate term, Sir William Jones has, after the French jurists, called a LOAN FOR USE (*Prêt à Usage*), to distinguish it from a *Mutuum*, or loan for consumption.[2] He defines it thus: "Lending for use, is a bailment of a thing for a certain time, to be used by the borrower without paying for it."[3] In the civil law, it is defined to be the grant of a thing to be used by the grantee gratuitously for a limited time, and

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[See further on the liability of bailees of slaves for their loss, Bowling *v.* Stratton, 8 Humph. 430.]

[1] Jones on Bailm. 57.

[2] Jones on Bailm. 64. See Monthly Law Magazine (London), April, 1839.

[3] Jones on Bailm. 118, 217.

then to be specifically returned. *Commodata autem res tunc proprie intelligitur, si nullâ mercede acceptâ vel constitutâ res tibi utenda data est. Gratuitum enim debet esse commodatum. Is, cui res aliqua utenda datur, id est, commodatur, re obligatur.*[1] Ayliffe says: "It is a grant of something, made in a gratuitous manner, for some certain use, and for a certain term of time, expressed or implied, to the end that the same species should be again returned or restored again to us; and not another species of the same kind or nature; and this in as good a plight as it was first delivered."[2]

§ 220. Lord Holt has defined this bailment to be, when goods or chattels, that are useful, are lent to a friend gratis, to be used by him; and it is called *Commodatum*, he adds, because the thing is to be restored *in specie*.[3] Mr. Chancellor Kent, with his usual neatness, defines it to be a bailment or loan of an article for a certain time, to be used by the borrower without paying for the use.[4]

§ 221. It is unfortunate, that our language has no word which exactly expresses the meaning of the Roman word; for the term loan is often employed to signify a lending upon interest, or a lending to be returned in kind.[5] It would have been well if Sir William Jones had not scrupled to naturalize the name by calling it a commodate (as he has called *Mandatum* a mandate), and thus to have made it as familiar in our law, as commodate is in the Scottish law, to express the same contract.[6] Ayliffe, in his Pandects, has gone further, and terms the bailor the *commodant*, and the bailee the *commodatary*,[7] thus avoiding those circumlocutions, which, in the common phraseology of our law, have become almost indispensable.

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[1] Ayliffe, Pand. B. 4, tit. 16, p. 516; Inst. Lib. 3, tit. 15, § 2; Dig. Lib. 13, tit. 6, l. 1; Id. l. 17, 3; Pothier, Pand. Lib. 13, tit. 6, Introd.; 1 Domat, B. 1, tit. 5, § 1, art. 1; Wood, Inst. B. 3, ch. 1, p. 215; Heinec. Pand. Lib. 13, tit. 6, § 96; Pothier, Pand. Lib. 13, tit. 6, n. 1.

[2] Ayliffe, Pand. B. 4, tit. 16, p. 516.

[3] Coggs *v.* Bernard, 2 Ld. Raym. 909, 913.

[4] 2 Kent, Comm. Lect. 40, p. 573, 4th edit.

[5] Doct. and Stud. Dial. 2, ch. 38; Jones on Bailm. 64.

[6] Ersk. Inst. B. 3, tit. 1, § 20; 1 Bell, Comm. § 197, 4th edit.; 1 Bell, Comm. p. 225, 5th edit.; 1 Stair, Inst. B. 1, tit. 11, § 1.

[7] Ayliffe, Pand. B. 4, tit. 16, p. 517.

§ 222. In the subsequent remarks on this subject, this contract will be designated by the term "Loan," and the bailor will be called the lender, and the bailee the borrower, according to the known usage of our language.

§ 223. It follows from the definition above stated, that several things are essential to constitute this contract. First. There must be a thing, which is lent; and this, according to the civil law, may be either a thing movable, as a horse, or an immovable, as a house, or land, or goods, or even a thing incorporeal.[1] But in our law the contract seems confined entirely to goods and chattels, or personal property, and it does not extend to real estate. This is sufficiently apparent from the definition of Lord Holt.[2] It must be a thing lent, in contradistinction to a thing deposited, or sold, or intrusted another for the sole benefit or purposes of the owner.

§ 224. Secondly. It must be lent gratuitously; for if any compensation is to be paid in any manner whatsoever, it falls under another denomination, that of hire.[3] Therefore, if A lends B his oxen for a week, under an engagement, that B shall lend A his oxen in return for another week, this is not a *Commodatum*, but a contract for hire.[4]

§ 225. Thirdly. It must be lent for use, and for the use of the borrower. It is not material, whether the use be exactly that which is peculiarly appropriate to the thing lent, as a loan of a bed to lie on, or a loan of a horse to ride. It is equally a loan, if the thing is lent to the borrower for any other purpose, as to pledge as a security on his own account.[5] But it is said in the Roman and foreign law, not to be a loan, if the lender himself, at the request of the borrower, directly pledges

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[1] Ayliffe, Pand. B. 4, tit. 16, p. 517; Dig. Lib. 13, tit. 6, l. 1, § 1; Pothier, Prêt à Usage, n. 14; 1 Domat, B. 1, tit. 5, § 1, art. 5; Pothier, Pand. Lib. 13, tit. 6, l. 1, § 1; Pothier, Prêt à Usage, n. 2.

[2] 2 Ld. Raym. 913.

[3] Ayliffe, Pand. B. 4, tit. 16, n. 516; Dig. Lib. 19, tit. 5, l. 17, § 3; 1 Domat, B. 1, tit. 5, § 1, art. 1; Pothier, Prêt à Usage, n. 3.

[4] Pothier, Prêt à Usage, n. 2, 3, 11; Dig. Lib. 19, tit. 5, l. 17, § 3.

[5] Pothier, Prêt à Usage, n. 2, 5; 1 Domat, B. 1, tit. 5, § 1, art. 6; Dig. Lib. 13, tit. 5, l. 5, § 12.

the property to a creditor of the borrower, as security for his debt; for then, it is properly a mandate.[1] This, at least, in our law, may often turn upon a nice question of evidence, as to the intent of the parties, whether it be to create a loan or a mandate.

§ 226. The use, also, must be the principal object, and not merely accessorial; for a pawnee, or depositary, may be at liberty to use the thing bailed, or even bound so to do, if necessary for its due preservation.[2] If the use be jointly for the benefit of the borrower and lender, it is no longer a loan. As if A and B are about to make a common entertainment for their mutual friends, at their joint expense, at B's house, and A lends a service of plate to B for the occasion; it is not strictly a loan, but an innominate contract, where ordinary diligence only is required.[3] So, if the goods are lent for the sole benefit or gratification of the lender, the borrower will not be liable, except for gross neglect; as if a person, passionately fond of music, for his own gratification at a concert, were to lend his own instrument to a player, and it were injured, without any gross negligence or wantonness, by the player, he would not be liable for the injury. But if it were lent for their joint benefit and gratification, then he would be bound to ordinary diligence at least, and he would be liable for ordinary neglect.[4]

§ 227. But the rights of the borrower are strictly confined to the use actually or impliedly agreed to by the lender, and cannot be lawfully exceeded.[5] The use may be for a limited time, or for an indefinite time. If it is for an indefinite time, but at the mere pleasure of the lender, it would in the civil law fall under the denomination of a *Precarium*, or a bailment at will. *Precarium est, quod precibus petenti utendum con-*

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[1] Pothier, Prêt à Usage, n. 2; Dig. Lib. 13, tit. 6, l. 5, § 12.

[2] Ante, § 329 to 332.

[3] Jones on Bailm. 72; Ayliffe, Pand. B. 4, tit. 16, p. 517; Dig. Lib. 13, tit. 6, l. 18; 1 Domat, B. 1, tit. 5, § 1, art. 6, 12; Pothier, Prêt à Usage, n. 51.

[4] Jones on Bailm. 73; 1 Dane, Abridg. ch. 19, art. 12. See Carpenter *v.* Branch, 13 Vermont, 161.

[5] Pothier, Prêt à Usage, n. 5, 21; 1 Domat, B. 1, tit. 5, § 1, art. 9, Introd., and § 2; Post, § 232, 255; 2 Kent, Comm. Lect. 40, p. 573, 574, 4th edit.

ceditur tamdiu, quamdiu is, qui concessit patitur. Qui precario concedit, sic dat, quasi tunc recepturus, cum sibi libuerit precarium solvere.[1] And this distinction between an ordinary loan and a *Precarium* gave rise in the Roman law to very different obligations on the part of the borrower, as to his responsibility for care and diligence.[2] But it would, in our law, still remain a loan.

§ 228. Fourthly. The property must be lent to be specifically returned to the lender at the determination of the bailment; and in this respect it differs from a *Mutuum*, or loan for consumption, where the thing borrowed, such as corn, wine, oil, or money, is to be returned in kind.[3] *Mutui autem datio consistit in his rebus, quæ ponderе, numero, mensurâve constant; veluti vino, oleo, frumento, pecuniâ numeratâ; quas res in hoc damus, ut fiant accipientis; postea alias recepturi ejusdem generis et qualitatis.*[4] It follows, that a loan can never be of a thing which is to be consumed by the use; as if wine is lent to be drunk at a feast, even if no return in kind is intended, unless, perhaps, so far as it is not drunk; for as to all the rest, it is strictly a gift.[5] *Non potest commodari id* (says the Roman law), *quod usu consumitur, nisi forte ad pompam vel ostentationem quis accipiat.*[6]

§ 229. As to the persons between whom a gratuitous loan may be contracted. In general, the contract may be said to

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[1] Ayliffe, Pand. B. 4, tit. 16, p. 516; Dig. Lib. 43, tit. 26, l. 1, § 1, 2; 1 Domat, B. 1, tit. 5, § 1, art. 2; Id. § 3, art. 2; Pothier, Prêt à Usage, n. 86, 87, 88; 1 Stair, Inst. B. 1, tit. 11, § 11; Ersk. Inst. B. 3, tit. 1, § 25.

[2] Pothier, Prêt. à Usage, n. 96; Post, § 253 a; 1 Domat, B. 1, tit. 5, § 3, art. 2; Ersk. Inst. B. 3, tit. 1, § 25.

[3] Jones on Bailm. 64; Pothier, Prêt. à Usage, n. 4, 10, 17; Ayliffe, Pand. B. 4, tit. 16, p. 517; 2 Kent, Comm. Lect. 40, p. 573, 4th edit.; 1 Domat, B. 1, tit. 5, § 1, art. 3 and 6; 1 Dane, Abridg. ch. 17, art. 11; Ante, § 47; Post, § 283, 284; 1 Stair, Inst. B. 1, tit. 11, § 1, 2; Pothier, Prêt. de Consumption, n. 4 to 7; Id. n. 22 to 24.

[4] Dig. Lib. 44, tit. 7, l. 1, § 2; Dig. Lib. 12, tit. 1, l. 1, § 2; Pothier, Pand. Lib. 12, tit. 1, n. 19.

[5] Dig. Lib. 13, tit. 6, l. 3, § 6. See 1 Domat, B. 1, tit. 5, § 1, art. 6; Pothier, Prêt. à Usage, n. 17; Ayliffe, Pand. B. 4, tit. 16, p. 517.

[6] Dig. Lib. 13, tit. 6, l. 3, § 6; Pothier, Prêt. à Usage, n. 17.

arise between any persons who have a legal capacity to contract. But in respect to idiots, lunatics, and married women, it cannot arise, unless, in the latter case, it is with the consent of her husband; in which event it binds him, but not her. In respect to minors, the contract is not absolutely void; but it is voidable at his election.[1] The contract must also be of a legal nature; for if it is immoral, or against law, it is utterly void. But on these points we need not dwell, since they belong to the law of contracts generally, and are sufficiently explained in other places.[2] The same principles, in most, if not in all these respects, apply in the Roman and foreign law; and Pothier deduces them from the general analogies which govern in other cases of contracts.[3]

§ 230. It is not necessary, that the lender should be the absolute proprietor of the thing; it is sufficient, if he have either a qualified or a special property therein, or a lawful possession thereof.[4] *Commodare possumus alienam rem, quam possidemus, tametsi scientes alienam possidemus.*[5] The Roman and foreign law carry this doctrine a step further; for it is there held, that even a thief may make a valid loan of the thing stolen, which the borrower will be bound to return, in the same manner as if the lender were the *bonâ fide* owner.[6] But this doctrine is to be received with the qualification, that the contract is valid as between the parties, and not as to the real owner.[7] And, although a man cannot generally become a borrower of his own goods, so as to bind himself by the contract, whether the fact of his ownership be known or unknown to him at the time, according to the maxim, *Commodatum rei suæ esse non potest;*[8] yet, where the lender has a special property, or a lien on them, he may lend them to the general owner for

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[1] Ante, § 50, 162; Post, § 302, 380.

[2] Ante, § 158; Post, § 379.

[3] Pothier, Prêt. à Usage, n. 13, 15; Pothier on Oblig. n. 49 to 52.

[4] 1 Domat, B. 1, tit. 5, § 1, art. 7; Pothier, Prêt. à Usage, n. 18.

[5] Dig. Lib. 13, tit. 6, § 15, 16.

[6] Pothier, Prêt. à Usage, n. 18, 46; Dig. Lib. 13, tit. 6, l. 15, 16; 1 Domat, B. 1, tit. 5, § 1, art. 7; Post, § 266.

[7] Pothier, Prêt. à Usage, n. 46.

[8] Pothier, Prêt. à Usage, n. 19.

a particular or temporary use; and the contract of loan, with its accessorial obligation to return it, will henceforth arise.[1]

§ 231. In the next place, let us consider what are the rights which the contract of loan confers on the borrower. In general, it may be said, that the borrower has the right to use the thing during the time and for the purpose which was intended between the parties. During this period and continuance of the use, the lender, according to the Roman law, is bound to suffer it to remain in the possession of the borrower, unless it be the case of a mere *Precarium*.[2] Of this more will be said hereafter.

§ 232. But the right of using the thing bailed is strictly confined to the use expressed or implied in the particular transaction.[3] And the borrower, by any excess will make himself responsible. If, therefore, A lends B his horse to ride from Boston to Salem, B has no right, however urgent his business may be, to ride with the horse to Newburyport.[4] And in such a case, if he rides the horse to Newburyport, and any accident occurs to the horse, although it be by inevitable casuality, he will be responsible for the loss. This rule is equally the result of the common law and the Roman law.[5] The Roman law treated a wilful deviation from the use intended as bringing

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[1] Pothier, Prêt à Usage, n. 19; 1 Atk. 235; 8 Term R. 199; Roberts *v.* Wyatt, 2 Taunt. R. 268.

[2] Pothier, Prêt à Usage n. 20; Ante, § 227; Post, § 255.

[3] Pothier, Prêt à Usage, n. 21, 22.

[4] Jones on Bailm. 68; Wheelock *v.* Wheelwright, 5 Mass. R. 104; Pothier, Prêt à Usage, n. 21, 22.

[5] Jones on Bailm. 68, 69; Cro. Jac. 244; 2 Ld. Raym. 909, 916; Ayliffe, Pand. B. 4, tit. 16, p. 517; 1 Domat, B. 1, tit. 5, § 2, art. 10, 11, 12; Dig. Lib. 13, tit. 6, l. 18; Code Civil of France, art. 1881; Pothier, Prêt à Usage, n. 21, 22; Id. n. 58, 60; Isaac *v.* Clarke, 2 Bulst. 306. Pothier makes a distinction between the case, where the borrower intended to go further, when he sat out on the journey, and where on the journey he had an unexpected call to go further. In the latter case, he thinks that the going further with the horse would be justifiable or excusable, upon the presumed consent of the owner; in the former, not, if the intention to go further was concealed from him. Pothier, Prêt à Usage, n. 21. In such a case our law would decide that the borrower had no right to go beyond the place named with the horse, since that was all the leave which he obtained. Post, § 254, 396, 409, 413.

with it the odium of theft, in the sense of that word as used in that law, which is more extensive than in ours. *Qui jumenta sibi commodata longius duxerit, alienâve re, invito domino, usus sit furtum facit.*[1]

§ 233. Lord Holt has put several cases to illustrate this doctrine. If a man lends another a horse to go westward, or for a month, and the bailee goes northward, or keeps the horse above a month, if any accident happens on the northern journey, or after the expiration of a month, the bailee will be chargeable; because, says he, he has made use of the horse contrary to the trust he was lent under; and it may be, if the horse had been used no otherwise than he was lent, that accident would not have befallen him.[2] Bracton inculcates the like doctrine; and it seems, indeed, as old as the first rudiments of our law.[3]

§ 234. A gratuitous loan is to be considered as strictly personal, unless from other circumstances a different intention may fairly be presumed. Thus, if A lends B her jewels to wear, this will not authorize B to lend them to C to wear. So, if C lends D his horse to ride to Boston, this will not authorize D to allow E to ride the horse to Boston. But if a man lends his horses and carriage for a month to a friend for his use, there a use by any of his family, or for family purposes, may be fairly presumed; although not a use for the benefit of mere strangers.

§ 235. The case of Bringloe *v.* Morrice[4] illustrates this doctrine. There, an action of trespass was brought for immoderately riding the plaintiff's horse. The defendant pleaded, that the horse was lent to him by the plaintiff, and license given him to ride him, and that, by virtue of the license, the defendant and his servants alternately had ridden the animal. The

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[1] Dig. Lib. 47, tit. 2, l. 40; Id. 13, tit. 6, l. 5, § 8; Pothier, Prêt à Usage, n. 22.

[2] Coggs *v.* Bernard, 2 Ld. Raym. 909, 915, 916; Tollemere *v.* Fuller, 1 Const. Rep. So. Car. 121; Pothier, Prêt à Usage, n. 21, 22; Vaughan *v.* Menlove, 3 Bing. N. C. 468.

[3] Bracton, Lib. 3, ch. 2, § 1, p. 99, 100.

[4] 1 Mod. R. 210; s. c. 3 Salk. 271. And see Scranton *v.* Baxter, 4 Sandf. 8.

plaintiff demurred. And the Court, on the demurrer, held, that the license was annexed to the person of the defendant, and could not be communicated to another; for this riding was matter of pleasure. And Lord Chief Justice North took a difference, where a certain time is limited for the loan of a horse, and where it is not. In the first case, the borrower has an interest in the horse during that time; and in that case his servant may ride; but in the other case, not. A difference was also taken between hiring a horse to go to York, and borrowing a horse. In the first place, the party may allow his servant to ride; in the second, not. The case is obscurely reported. But the real meaning of the Court seems to have been, that in cases of a mere gratuitous loan, the use is to be deemed strictly a personal favor, and confined to the borrower, unless a more extensive use can be implied from the other attendant circumstances.

§ 236. In the next place, as to the obligations of the borrower. These are, to take proper care of the thing borrowed; to use it according to the intention of the lender; to restore it at the proper time; and to restore it in a proper condition.[1] These will be spoken of in their order.

§ 237. In the first place, as to the proper care of the thing. As the loan is gratuitous, and exclusively for the benefit of the borrower, he is, upon the common principles of bailment, already stated, bound to extraordinary diligence; and of course he is responsible for slight neglect in relation to the thing loaned.[2] It is singular, that Lord Holt,[3] and after him Mr. Justice Blackstone,[4] should have considered that the same degree of diligence, and the same degree of responsibility, attached to a bailee of a thing for hire, and to a mere borrower of a thing; for the contracts are wholly unlike in their nature and character. Sir William Jones is of opinion, that the bor-

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[1] 1 Domat, B. 1, tit. 5, § 2, art. 1; Pothier, Prêt à Usage, n. 23; Ante, § 232; Post, § 254, 255.

[2] Jones on Bailm. 64, 65; Vaughan *v.* Menlove, 3 Bing. N. C. 468, 475. Phillips *v.* Condon, 14 Illinois, 84. Scranton *v.* Baxter, 4 Sandf. 8.

[3] Coggs *v.* Bernard, 2 Ld. Raym. 909, 916.

[4] 2 Black. Comm. 453.

rower's incapacity to exert more than ordinary diligence will not, even upon the ground of an impossibility, furnish a sufficient excuse for slight neglect; for he contends, that the borrower ought to have considered his own capacity, before he deluded his friend by engaging in the act of borrowing.[1] And this also is the doctrine of Pothier.[2] But this doctrine must be received with some qualification and reserve, and be confined to cases where there is either an implied engagement for extraordinary diligence, or the lender has no reason to suspect or presume a want of capacity. For if the lender is aware of the incapacity of the borrower, he has no right to insist upon such rigorous diligence. He has a right to insist on that degree of diligence only, which belongs to the age, the character, and the known habits of the borrower. Thus, if a spirited horse is lent to a raw or rash youth, or to a weak and inefficient person, who is known to be such, the lender must content himself with such diligence as they may fairly be expected to use; and he has no right to insist upon the diligence or prudence of a very thoughtful and experienced rider.[3] Pothier himself admits the propriety of this distinction; and it is adopted by Dumoulin.[4] Indeed, in this case, as in the case of a deposit or a mandate, the bailor may, in many cases, fairly be presumed to trust to the known habits and character of the bailee, and to content himself with that degree of skill, or diligence, or ability, which he is known to possess.[5]

§ 238. The language of the Roman law, on the subject of the diligence exacted from the borrower, is very strong. *Exactissimam diligentiam custodiendæ rei præstare compellitur; nec sufficit ei eandem diligentiam adhibere, quam suis rebus adhibet, si alius diligentior custodire poterit*, is the language of the Pandects.[6] And again: *In rebus commodatis talis dil-*

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[1] Jones on Bailm. 65; 1 Dane, Abridg. ch. 17, art. 12.

[2] Pothier, Prêt à Usage, n. 49.

[3] Jones on Bailm. 65; 2 Kent, Comm. Lect. 40, p. 574, 575, 4th edit.; Pothier, Prêt à Usage, n. 49, 89; Bracton, Lib. 3, tit. 2, § 1, 99 b.

[4] Pothier, Prêt à Usage, n. 49.

[5] See ante, § 63 to 66, 175, 177, 180, 182.

[6] Dig. Lib. 44, tit. 7, l. 1, § 4.

igentia præstanda est, qualem quisque diligentissimus paterfamilias adhibet; ita ut tantum eos casus non præstet, quibus resisti non possit.[1] Pothier says, that it is not sufficient for the borrower to exert the same ordinary care, which fathers of families are accustomed to use about their own affairs; but that he ought to exert all possible care, such as the most careful persons apply to their own affairs; and that he is liable not only for a slight fault, but for the slightest fault, *de levissimâ culpâ.*[2] And again he says, that the borrower is not limited by his undertaking to bringing to the care of the thing loaned the same diligence which he would exert if it were his own. He is bound to bring to it all possible care: *Tenetur exhibere exactissimam diligentiam.*[3] This rule, however, admits, both in the Roman law and in the foreign law, of two exceptions; the first is, where there is a special contract, express or implied, varying the general obligation; for, in such a case, the special contract will govern in all cases, unless, indeed, it should provide that the borrower shall not be responsible for his own fraud. The borrower, therefore, may lawfully contract that he shall be responsible only for ordinary diligence, or even for good faith. *Interdum plane dolum solum in re commodatâ, qui rogavit, præstabit; utputa, si quis*

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[1] Dig. Lib. 13, tit. 6, l. 18.

[2] Pothier, Prêt. à Usage, n. 48, 50, 54, 55, 56. Yet some of the civilians use language so loose and indeterminate, as might lead one to doubt what the true rule was. Thus Ayliffe says: "The commodatary, or person to whom the thing is lent, is not obliged to answer for an uncontrollable force, or for the loss or damage of the thing, which happens by any fortuitous cause, provided such accident does not intervene through his fault or neglect. But, if he is guilty of any fraud or gross negligence, he shall make the loss or damage good; for it is necessary that he should take the same care of the thing as every prudent man would take of his own goods, since this contract is entered into for his sake." Ayliffe, Pand. B. 4, tit. 16, p. 517. This last is only ordinary diligence.

[3] Pothier, Prêt. à Usage, n. 56. Pothier here relies on the intense sense of the words "exactissimam diligentiam," in the Roman law. Yet he admits, and indeed insists, that, in cases of hire, the words "exactissimam diligentiam" are not used in this intense sense, but mean only ordinary diligence. Sir William Jones contends for the same doctrine. Post, § 398; Jones on Bailm. 87, 88.

ita convenit.[1] The second exception is, where the loan is not strictly for the benefit of the borrower alone; for, if it is for the mutual benefit of the borrower and lender, there ordinary diligence only is required.[2] An attempt has been made to ingraft another exception upon the rule; namely, where the lender makes a voluntary or officious offer, before he is asked by the borrower. But Pothier justly considers that such an offer, if accepted, ought not to change the responsibility of the borrower.[3]

§ 238 *a.* It seems hardly necessary to add, that the same care, which the bailee is bound to take of the principal thing bailed, must be extended to such accessory things as belong to it, and were delivered with it. Thus, if a man borrows a watch, with seals to it, he will be responsible for any loss or injury, occasioned by his slight neglect, as well to the seals as to the watch.[4]

§ 239. What shall be deemed slight neglect, or want of extraordinary diligence, must depend upon the particular circumstances of each case. It has been before seen, that by the Roman law and the foreign law theft ordinarily constitutes no excuse, because, it is said, it can scarcely arise without some default or negligence of the borrower.[5] But this is merely presumptive evidence, which may be repelled by the borrower, and, if the theft has been without any fault on his part, he will be excused.[6] Thus, if A borrows a silver ewer of B, and afterwards delivers it to a person of such approved fidelity and wariness, that no event could be less expected than its being stolen, to be by him returned to B, if it should be stolen from that person by thieves, without any neglect on his part, A

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[1] Pothier, Prêt. à Usage, n. 51, 60; Dig. Lib. 13, tit. 6, l. 5, § 10; Jones on Bailm. 72.

[2] Pothier, Prêt. à Usage, n. 50, 51; Dig. Lib. 13, tit. 6, l. 18; Pothier, Pand. Lib. 13, tit. 6, n. 17; Ayliffe, Pand. B. 4, tit. 16, p. 517; Jones on Bailm. 72.

[3] Pothier, Prêt. à Usage, n. 52; Ante, § 214.

[4] Jones on Bailm. 66; Pothier, Prêt. à Usage, n. 54, 74; Dig. Lib. 13, tit. 6, l. 5, § 9; Post, § 260.

[5] Ante, § 38; Pothier, Prêt à Usage, n. 53.

[6] Dig. Lib. 13, tit. 6, l. 20, 21, § 1; Pothier, Prêt à Usage n. 53; Ante, § 38, 39.

would be excused, and it would be treated as *damnum absque injuriâ*.[1] *A fortiori*, the borrower would be excused, if the thing should, under such circumstances, be stolen by robbery with open force, or by burglary; for this would be a case of the *vis major*.[2] In our law, as we have already seen, theft is not presumptive of negligence or default in the bailee;[3] and therefore, whether the borrower would be liable in a case of theft or not, would depend upon the point, whether, taking all the circumstances together, there was any proof of negligence in the borrower.

§ 240. The borrower is also exempted, generally, from all liability for losses by inevitable accident, or by casualties which could not be foreseen and guarded against. This is equally true in the common law and in the Roman law. *Is, vero, qui utendum accepit, si majore casu, cui humana infirmitas resistere non potest, veluti incendio, ruinâ, naufragio, quam accepit, amiserit, securus est*, is the language of the Pandects;[4] and our own Bracton announces the same doctrine.[5] Under the head of casualties may be enumerated, not only such losses as have been mentioned, namely, fire, the fall of edifices or ruins, shipwreck, and lightning, but also all such losses as human prudence cannot by extraordinary diligence guard against, such as losses by pirates, by enemies, by mobs, by sudden inundations, by sudden sickness, and even by the frauds of strangers, against which the borrower could not guard himself.[6]

§ 241. But there is an implied exception in all these cases of casualty and accident, which is, that they shall be without any default on the part of the borrower; for if they are connected

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[1] Dig. Lib. 13, tit. 6, l. 20; Pothier, Prêt à Usage, n. 53; Jones on Bailm. 66; Ante, § 39.

[2] Pothier, Prêt à Usage, n. 53; Jones on Bailm. 69; 2 Ld. Raym. 909, 915, 916; 2 Kent, Comm. Lect. 40, p. 575, 4th edit.

[3] Ante, § 38, 39.

[4] Dig. Lib. 44, tit. 7, l. 1, § 4; Ante, § 30.

[5] Bracton, Lib. 3, ch. 2, p. 99; Vin. Abr. *Bailment*, A.; Bac. Abr. *Bailment*, C.; Doct. and Stud. Dial. 2, ch. 38; Ante, § 29, 30; Post, § 268.

[6] Ante, § 25, 26, 28, 29, 30; 1 Domat, B. 1, tit. 5, § 2, art. 6, p. 113; Dig. Lib. 13, tit. 6, l. 5, § 2 and 4; Pothier, Prêt à Usage, n. 55, 57; Jones on Bailm. 66, 67.

with his default, his responsibility remains.[1] Such is the express rule of the Roman law. *Sed, et in majoribus casibus, si culpa ejus interveniat, tenetur.*[2] Thus, if a borrower is imprudent enough to leave the high road and pass through some thicket or unfrequented path, or to travel at a very unseasonable hour, or on a road notoriously frequented by robbers, without proper precautions, and a robbery takes place, he will nevertheless, be liable for the loss.[3] So, if he rides a borrowed horse on a dark and improper road, and the horse falls, and is killed by the accident; or if he puts the horse into an improper pasture, and he is stolen by robbers, he will be responsible for the loss; for accident or irresistible force will not excuse his own rashness.[4] So, if a lady borrows jewels to wear at a ball, and by her imprudence they are lost by robbery; or if she exposes them to any other undue perils by leaving them in an improper place, the loss, although by accident, will be her own.[5] So, if a man borrows jewels and other valuable articles to wear at a mask or a ball, and he afterwards goes with them to a theatre or to a gaming-house, and the jewels are there lost or stolen, he will be responsible therefor; for the loss may justly be attributed to his own negligence or rashness.[6]

§ 242. But in a like case of borrowed jewels, if they were lost by robbery, or by accident, and the borrower used them in a suitable manner, and left them in suitable places only, then the loss must fall on the lender; for although the borrower's wearing them, or leaving them in a particular place, may be said to be the occasion of the loss, yet it cannot be said to be the cause of the loss. So, in the case of a borrowed horse for a journey, if the borrower rides him by the usual roads, and at the proper hours, and in the usual

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[1] Pothier, Prêt à Usage, n. 55–58; Jones on Bailm. 67, 68, 69; Dig. Lib. 13, tit. 8, l. 5, § 4; Ayliffe, Pand. B. 4, tit. 16, p. 517; Ante, § 93, 94, 184, 185.

[2] Dig. Lib. 44, tit. 7, l. 1, § 4; Pothier, Prêt à Usage, n. 56, 57.

[3] See Pothier, Prêt à Usage, n. 57; Pothier, Louage, n. 195; Pothier on Oblig. n. 142; Jones on Bailm. 68; 2 Kent, Comm. Lect. 40, 576, 4th edit.

[4] Jones on Bailm. 67, 68; Pothier, Prêt à Usage, n. 55, 56, 57; Ante, § 93 to 96.

[5] Jones on Bailm. 68, 69; Pothier, Prêt à Usage, n. 56, 57.

[6] Jones on Bailm. 69. And see Scranton *v.* Baxter, 4 Sandf. 8.

manner, if the horse should be stolen by robbers in passing through a forest in the road, or he should fall, and be killed, the borrower, if he has used all proper care and diligence, will not be responsible for the loss.[1] And this difference is deemed very material by Pothier in solving questions of this nature.[2] My passing through a forest with a borrowed horse may be the *occasion* of my being robbed of him there; but in a just sense, if the forest were necessary to be passed in my journey, my passing could not be considered as the *cause* of the loss, as I was guilty of no neglect. But the cause of the loss is correctly to be referred to the robbery.[3]

§ 242 *a*. Again, the borrower is responsible for the loss, not only when he might have saved the thing by proper care from the accident, but when his own neglect has been the occasion of the accident.[4] If the borrower puts a borrowed horse under a ruinous building, and it falls, and kills or maims the horse, and the borrower might have foreseen this, he is responsible.[5] But if the fall is caused by an unexpected storm, then he is not responsible, if, in ordinary cases, the place would have been safe.[6]

§ 243. Cases of fraud, also, are naturally and properly excepted, whether they are founded in positive misrepresentation, or injurious concealment: *Vel suppressione veri, vel allegatione falsi.* There may be a direct fraud practised, by asking the loan under false pretences; and there may be a tacit fraud, by misleading the ignorance of the lender under circumstances raising the presumption of a different state of facts. Pothier, and, after him Sir William Jones, put a case in illustration of this doctrine. If a soldier were to borrow a horse of a friend for a battle, expected to be fought the next morning, and were

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[1] Pothier, Prêt à Usage, n. 55.

[2] Jones on Bailm. 67; Pothier, Prêt à Usage, n. 55, 56, 57.

[3] Jones on Bailm. 67; Pothier, Prêt à Usage, n. 55, 56, 57.

[4] Pothier, Prêt à Usage, n. 56, 57; Dig. Lib. 13, tit. 6, l. 5, § 4; Dig. Lib. 44, tit. 7, l. 1, § 4.

[5] Doct. and Stud. Dial. 2, ch. 38; Jones on Bailm. 68; Id. 109, note (q).

[6] Pothier, Prêt à Usage, n. 56; Jones on Bailm. 68; Id. 109, note (q); Doct. and Stud. Dial. 2, ch. 38.

to conceal from the lender the fact, that his own horse was as fit for the service, if the borrowed horse were slain in the engagement, the borrower would be responsible; for the natural presumption created by the concealment is, that the horse of the borrower is unfit, or that he has none. But if the borrower had frankly stated the fact, then the loss must be borne by the lender.[1] A more simple case of tacit fraud would be, where the soldier has borrowed the horse for the next day, concealing the fact of any expected battle, or of any intended use for that purpose; for the lender may be fairly presumed, in such case, to lend for a journey, or for common use, and not for war.[2]

§ 244. There are yet other cases, which also form, or rather, which may, under peculiar circumstances, form exceptions to the general rule, that the borrower shall not be responsible for accidents. Thus, it is said by Domat, that, if the thing lent perishes by an accident, against which the borrower might have guarded by employing a like thing of his own, he shall be responsible for the loss; for it is said, he ought not to have used it, except for want of his own.[3] But this doctrine, if true at all, is true only under such circumstances as lead to a just imputation of negligence, or of an improper exposure of the thing borrowed.[4] If A borrows the jewels of B for a ball, deeming them more brilliant or more pleasing than his own, and they are lost by a casualty without his default, it is difficult to perceive a sound reason why he should be made liable for the loss. The use was contemplated; and if the lender knew that the borrower also owned jewels, he must have meant to leave the choice to the borrower. If he did not know that the borrower owned jewels, and there was no fraud or concealment practised upon him to encourage the loan, the same result would seem to follow. If A owns a horse, and B lends him his horse for a week, why may not A use the borrowed horse, as well

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[1] Pothier, Prêt à Usage, n. 59; Jones on Bailm. 70; 2 Kent, Comm. Lect. 40, p. 575, 4th edit.

[2] Dig. Lib. 13, tit. 6, l. 5, § 7; 1 Domat, B. 1, tit. 5, § 1, n. 9.

[3] 1 Domat, B. 1, tit. 5, § 2, art. 7; 2 Kent, Comm. Lect. 40, p. 576, 4th edit.

[4] See Post, § 245 to 250.

as his own, for common purposes, if he does not expose him to undue labor or peril? Suppose he should deem the exercise proper and beneficial for the borrowed horse, and the latter should perish by some accident, would it be his loss?

§ 245. Pothier and the civilians have put a case under this head, which is somewhat nice and curious; and, as Sir William Jones has commented on it, it may be well to state it in his own words. "If the house of Caius be in flames," says he, "and he, being able to secure one thing only, saves an urn of his own in preference to the silver ewer which he had borrowed of Titus, he shall make the lender a compensation for the loss; especially if the ewer is the more valuable, and would consequently have been preferred, had he been owner of them both. Even if his urn is the more precious, he must either leave it, and bring away the borrowed vessel, or pay Titus the value of that which he has lost; unless the alarm was so sudden and the fire so violent, that no deliberation or selection could be justly expected; and Caius had time only to snatch up the first utensil that presented itself."[1] This is apparently the doctrine of the Pandects, the text of which is as follows: *Si incendio vel ruinâ aliquid contigit, vel aliquod damnum fatale, non tenebitur; nisi forte, quum possit res commodatas salvas facere, suas prætulit.*[2] Pothier approves of the same doctrine; and assigns as a reason, that the borrower is obliged to use the most exact diligence in respect to the thing borrowed, and he bestows less than his engagement imports, when he uses less than he applies to his own property, even when he applies it to a case where there is an impossibility of saving the borrowed property as well as his own.[3]

§ 246. Three cases are put by Pothier, and may readily be imagined; first, where the thing borrowed is of greater value than the borrower's own property; secondly, where the things are each of the same kind and value; thirdly, where the bor-

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[1] Jones on Bailm. 69, 70.

[2] Dig. Lib. 13, tit. 6, l. 5, § 4; Pothier, Prêt à Usage, n. 56.

[3] Pothier, Prêt à Usage, n. 56. In the case of a deposit Pothier holds a different doctrine, and decides in favor of the depositary. Pothier, Traité de Dépôt, n. 29; Post, § 249.

rower's own property is of the greatest value. Pothier decides each of the cases against the borrower, admitting the last to be of chief difficulty.[1] His reasoning on the last case is to this effect. It is true, that the borrower cannot be reproached with any want of fidelity; but still the borrower undertakes for extraordinary diligence (*Tenetur adhibere exactissimam diligentiam*); and by the nature of his contract he engages for all risks, except losses occasioned by the *vis major*. *Præstat omne periculum, præter casus fortuitos, seu vim majorem.* Now that alone is deemed to be *vis major* which cannot be resisted: *Vis major, cui resisti non potest.* Although the borrower could not save both his own and the borrowed goods, yet he could have saved the latter at the expense of his own; and therefore they could not be said to be lost by the *vis major*. He admits, that it would be otherwise, where the tumult is such that the borrower has no choice, and saves what comes to his hands first, without any opportunity to exercise his judgment.[2]

§ 247. It may seem rash to doubt the accuracy of the reasoning or conclusions of such distinguished minds, backed, as they are, by the positive text of the Roman law. And, if the question were one of a practical nature, it might be fit to abstain from any commentary. But, as it is scarcely more than a speculative proposition, it may not be wholly useless to lay before the reader some considerations for doubt upon the point.

§ 248. It is observable, that the question is not stated by the learned jurists, as one of presumptive evidence, fit for the decision of a court or of a jury, as judges of the facts; but as a clear conclusion of law. If the thing borrowed is of very great value, such as a casket of jewels, and the thing saved is of little proportionate value, there might be some foundation for a presumption of undue preference for the latter, and of undue inattention to the former. That, however, would be matter of fact, to be weighed under all the circumstances.

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[1] Pothier, Prêt à Usage, n. 56, 57.

[2] Id. n. 56.

But the case, as put, goes much further, and decides, that even if the borrower's own property is of very great value, nay, of the highest value, and the borrowed property is of a very subordinate value, the law is the same; and, *a fortiori*, it is the same if they are of equal value. It is chiefly in relation to the case of the superior value of the borrower's property that the reasoning is pressed; and to that our doubts may be now confined.

§ 249. The question, in our law at least (and it would seem, also, in the Roman law), is, whether the borrower has been guilty of slight negligence, which, of course, is the omission of very exact diligence; for without that he is not liable at all. The loss is confessedly by an "*inevitable mischance*" (for so Sir William Jones and Pothier put it);[1] and in such a case, no responsibility can attach upon the borrower, unless there has been some neglect on his own part. It is not true, as Pothier suggests, that the borrower is responsible for all losses, not occasioned by the *vis major*, or by fortuitous occurrences. Losses by theft without any default of the borrower, and losses of all sorts, where he exercises the proper degree of diligence, are to be borne by the lender. It is not necessary to show, that the loss has been absolutely fortuitous, or by the *vis major*, in a strict sense. It is sufficient to show that there has been no negligence whatsoever in occasioning the loss. The question, then, is, whether there is any negligence in the case thus presented. It is not, of course, sufficient to show, as Pothier suggests, that the borrower has taken as good care of the borrowed goods as of his own; for that is not the extent of his obligation, it being for very exact diligence. But if the party does, in fact, use very exact diligence in respect to his own goods, then, if he uses the same diligence in regard to the borrowed goods, his obligation is fully complied with. Now, if a man, in a case of fire, saves of his own goods those which are preëminently valuable, it would be against common sense to say that he did not use the utmost diligence in respect to

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[1] Jones on Bailm. 69. Pothier puts the case of a fire by lightning. Pothier, Prêt à Usage, n. 56.

others, when it was impossible for him to save them all. The very case put by Pothier supposes that it is impossible to save both the lender's and the borrower's goods. In a case, then, confessedly of extreme necessity, the borrower is made responsible for an exercise of his natural right of choice. He saves the most valuable goods, which would seem to be a rational course; and yet he is bound to pay for the loss of the other goods. Pothier does not pretend, that, in such a case, there is any real negligence imputable to the borrower. His reasoning implies that there is none. But he assumes (what he does not prove), that, if the thing borrowed, could by possibility have been saved, at however great a sacrifice, the borrower is bound to make that sacrifice. Nay, the reasoning of Pothier and Sir William Jones would almost tempt one to suppose that they thought, that, if in such a case the borrower might have saved the borrowed goods by abandoning his own, and he should leave both to perish in the flames, he might be excusable.[1] Yet this cannot be, if there is any negligence in the case, arising from the mere fact of leaving the borrowed goods to perish. If a party suffers his own goods to perish in the flames, it is no excuse for suffering the borrowed goods to perish in the same manner. It may afford some presumption against negligence, especially if the borrower's own goods are of a very superior value. But, if he might have saved the borrowed goods by uncommon diligence, there is no excuse for him in point of law.[2]

§ 249 *a*. Both Pothier and Sir William Jones reason differently in the case of a deposit under the like circumstances. After having remarked, that a depositary is only bound to the same measure of diligence which he uses in his own affairs, Sir William Jones adds: "It must, however, be confessed that the character of the individual depositary can hardly be an object of judicial discussion. If he be *slightly* or even *ordinarily* negligent in keeping the goods deposited, the favorable presumption is, that he is equally neglectful of his own property.

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[1] Pothier, Traité de Dépôt, n. 29, 66.

[2] Jones on Bailm. 69, 70; Id. 46, 65, 66, 120, 122.

But this presumption, like all others, may be repelled. And, if it be proved for instance, that, his house being on fire, he saved his own goods, and, having time and power to save also those deposited, suffered them to be burned, he shall restore the worth of them to the owner. If, indeed, he have time to save only one of two chests, and one be a deposit, the other his own property, he may justly prefer his own; unless that contain things of small comparative value, and the other be full of much more precious goods, as fine linen, or silks; in which case he ought to save the more valuable chest, and has a right to claim indemnification from the depositor for the loss of his own. Still further; if he commit even a gross neglect in regard to his own goods, as well as those bailed, by which both are lost or damaged, he cannot be said to have violated good faith, and the bailor must impute to his own folly the confidence which he reposed in so improvident and thoughtless a person."[1] Precisely the same doctrine is maintained by Pothier. He admits that in the case of a deposit, under similar circumstances, if the depositary cannot save his own goods, as well as those deposited, he may innocently save his own in preference to those deposited. If, indeed, the deposited goods are of far greater value than his own, he thinks the depositary is bound to save those deposited, even if thereby his own perish; but then he insists, that in such a case he is entitled to be indemnified by the depositor for his own loss.[2]

§ 249 *b*. The true test of liability in all cases of this sort would seem to be, to ascertain whether there is any negligence in not saving the borrowed goods; and whether there is any superior duty of the borrower to save them and sacrifice his own. Unless there is some such superior duty, it is difficult to perceive what ground there is to impute negligence to the borrower in so calamitous a case. The case put of a depositary shows that he is guilty of no negligence or default in saving his own goods in preference to those of the depositor. When he saves the latter, it is treated as a sacrifice beyond his duty, entitling him to a compensation in the nature of salvage.[3]

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[1] Jones on Bailm. p. 46, 47.

[2] Pothier, Traité de Dépôt, n. 29; Ante, § 66 a.

[3] Pothier, Traité de Dépôt, n. 29. Pothier, Prêt à Usage, n. 55; Ante, § 66 a.

§ 250. But it is not true, that a borrower is bound to make every possible sacrifice in order to save the borrowed goods. If a man borrows a friend's horses and carriage for a journey, he is not bound to carry with him a troop of horse to guard them against a possible robbery; nor is he bound to protect them at the risk of his own life, or to the imminent hazard of his own person, or of other valuable property. If, finding himself unexpectedly beset by robbers, and not knowing their force, he abandons the horses and carriage, and he escapes with his servants, not choosing to hazard the possible chances of resistance, partly because he has very valuable treasures with him, and partly from fear of assassination, can he be held responsible for the loss, if there was a fair and honest exercise of judgment, and it was such conduct as a very diligent and careful man would adopt? If a house is on fire, is a man bound to risk his life or limbs to save borrowed goods, even if, in the event, from unforeseen circumstances, or by great steadiness of purpose, it is possible, nay, practicable, so to do? No doctrine has as yet gone to this extent. The reasoning, then, which we have been considering, turns upon a supposed superior duty, in a common calamity or accident, to save that which is borrowed in preference to that which is one's own, whatever may be the value of the latter compared with the former. But the whole controversy turns upon the very question, whether there is any such superior duty. It is not to be assumed, and then reasoned from. It must be established, as a just inference from the principles of law applicable to the subject.

§ 251. The doctrine of our law is, that, in every case of a gratuitous loan, to charge the borrower, there must be some neglect of duty, some slight omission of diligence. If the highest possible diligence cannot save both the borrowed goods and the goods of the borrower, where is the rule to be found which prescribes the choice in such a case, and compels a man to abandon his own for another's? Principles going much deeper into human feelings, and morals, and rights, have not insisted on such an overwhelming sacrifice of personal preference. If two men are on a plank at sea, and it cannot save both, but it may save one, it has never yet been held, that, in a common calamity and struggle for life, either party was bound

to prefer the other's life to his own. If a ship is capsized at sea, and the ship's boat is sufficient to save a part of the crew only, is there a known duty to prefer a common destruction of all to the safety of a part? If the crew of a foundered ship are dying from hunger at sea, are all to perish, or may they not cast lots for life or death to preserve the rest? These cases are put merely to show, that, in a common calamity, the law does not look to mere heroism, or chivalry, or disinterested sacrifices. If it has furnished no rule for such cases, it is because they are incapable of any; for necessity has no law. And to say the least of it, the equity as well as the policy, of any such rule as Pothier contends for, is as questionable as any which can be put in the dialectics of casuistry.[1] The Code of France and the Code of Louisiana have, however, adopted the doctrine of Pothier;[2] and have thus given it a sanction, which may, perhaps, be thought sufficient to silence any private doubts.

§ 252. Another exception may arise, where there is a special contract between the parties. As if the borrower undertakes for all perils, he will become chargeable for any loss, covered by his engagement, although he would not be otherwise chargeable; for there is a sufficient consideration to support such an engagement.[3] In this respect the Roman and the foreign law are in perfect accordance with the common law. For the lender has certainly a right to prescribe his own terms as to the loan; and if the borrower assents to them, and the loan is perfected by a delivery, there is neither equity nor justice in absolving him from the terms of his engagement, to the injury or detriment of the lender.[4]

§ 253. Another curious question has been much discussed by the civilians, which Pothier mentions, and Sir William Jones has also commented on, as properly belonging to this head. It is, whether, in the case of a valued loan, or where

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[1] See 2 Kent, Comm. Lect. 40, p. 575 to 576, 4th edit.

[2] Code Civil of France, art. 1882; Code of Louisiana (1825), art. 2817.

[3] 1 Domat, B. 1, tit. 5, § 2, art. 8; Pothier, Prêt à Usage, n. 61; Jones on Bailm. 72; Cod. Lib. 4, tit. 23, l. 1; Ante, § 2, p. 2, sub finem, note (1).

[4] Pothier, Prêt à Usage, n. 61.

the goods are estimated at a certain price, the borrower must be considered as bound, at all events, to restore either the things lent, or the value of them.[1] The controversy has grown out of some texts of the Pandects, in one of which it is said: *Si forte res æstimata data sit, omne periculum præstandum ab eo, qui æstimationem se præstaturum recepit;*[2] and in another place: *Æstimatio autem periculum facit ejus, qui suscepit.*[3] The civilians have entertained different opinions upon this subject; but it seems unnecessary to state them at large. Pothier has given a very clear summary of them, and holds the better opinion to be, that the borrower is not in such a case responsible for losses by accident.[4]

§ 253 *a*. In the common law the controversy would turn wholly upon the construction of the words of the particular contract. The mere estimation of a price would not, of itself, settle the point, whether the borrower took upon himself every peril, or any additional peril beyond the common rules of law. But it would be construed as a mere precaution to avoid dispute in case of a loss, unless some other circumstances raised a presumption, that the parties intended something more. If the lender were to say to the borrower, on lending him a horse: "You know my horse is worth one hundred dollars, and you will be obliged to pay that sum, if he should be lost by any negligence; take, therefore, the proper care of him;" to which the borrower should assent; no one would imagine, that, if the horse died on the journey without any default of the borrower, he would by our law be liable to pay for the loss. But if the borrower were to say to the lender: "Lend me your horse to go to Oxford, and I will either return him to you or pay you his value, which is one hundred dollars," and the lender should assent; then it might justly be inferred, that he took the peril upon himself. So that it would with us come to a matter of fact, what the contract was, rather than to a matter of law.

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[1] Jones on Bailm. 71, 72.

[2] Dig. Lib. 13, tit. 6, l. 5, § 3.

[3] Dig. Lib. 19, tit. 3, l. 1, § 1; Pothier, Prêt à Usage, n. 62.

[4] Pothier, Prêt à Usage, n. 62, 63; Jones on Bailm. 71, 72; Code of Louisiana (1825), art. 2872; 1 Stair, Inst. B. 1, tit. 11, § 9; Post, § 253 b.

Such is the opinion of Sir William Jones.[1] Pothier holds a like opinion, and supports it with strong reasons.[2] It is not of any great importance to perplex ourselves with questions of this nature, as they seem purely speculative, since a case can scarcely be imagined, where some circumstance, giving a construction one way or the other, would not be found to explain the reason for fixing the price. The Code of France and the Code of Louisiana have solved the difficulty by a positive declaration, that, if the article is valued on the lending, the loss which may happen even by accident shall be that of the borrower, if there is no agreement to the contrary.[3] The fixing of a price, therefore, is thus interpreted to raise a presumption of a contract on the part of the borrower against all risks, which, however, he may repel by other proofs.

§ 253 *b*. What has been already said in respect to the degree of care and diligence required of the borrower, applies to gratuitous loans, strictly so called. But in the Roman law, a distinction was taken between the responsibility in cases of a gratuitous loan, and that in cases of a precarious loan (*Precarium*).[4] In the former, as we have seen, the most exact possible care was required of the borrower, and he was liable for the slightest fault.[5] But in cases of a precarious loan, or *Precarium*, it was not treated as properly a contract, or *quasi* contract, on which an action at law lay; but only as an obligation which could be enforced in the forum of the prætor, upon equitable principles. And hence the borrower, in such a case, was held responsible only for good faith, and was made responsible only for fraud and gross negligence: *De dolo, et de latâ culpâ, quæ dolo comparatur*.[6] This distinction of the Roman law is not, however, recognized in the law of France;[7] although it is in that of Scotland;[8] and it probably also may be found, in the

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[1] Jones on Bailm. 71, 72; Post, § 253 b.

[2] Pothier, Prêt à Usage, n. 62, 63.

[3] Code Civil of France, art. 1833, and Code of Louisiana (1825), art. 2872.

[4] Ante, § 227.

[5] Ante, § 238.

[6] Pothier, Prêt à Usage, n. 88; Dig. Lib. 43, tit. 26, l. 8, § 3, 6.

[7] Pothier, Prêt à Usage, n. 89.

[8] Ersk. Inst. B. 3, tit. 1, § 25.

law of some other modern nations. It certainly has no existence in our law, where, indeed, all gratuitous loans are treated as precarious.[1]

§ 253 *c*. It may be well to close this head by stating, in the words of Lord Stair, the general rule of the Scottish law on the subject of the care and diligence of the borrower, which, indeed, includes the substance of what has been already stated. "As to the diligence due by the borrower," says he, "the case must be distinguished; for some things may be lent only for the behoof of the lender, as he who lends clothes or instruments to his servants for his own use and honor; sometimes to both the lender and borrower's use; and oftenest to the borrower's use alone. In the first case, the borrower is holden only for the grossest faults and negligence; in the second, for ordinary faults, *culpâ levi;* in the last, for the lightest fault, and is obliged for such diligence as the most prudent use in their affairs. But in all cases the borrower is obliged *de dolo;* yea, no paction can be valid in the contrary, as being against good manners. In no case is the borrower obliged for any accident, as death, naufrage, burning, unless he hath undertaken that hazard, either expressly or tacitly; as *in commodato æstimato*, which imports, that if the thing perish it is lost to the borrower, and he must pay the price. For, as *in dote æstimatâ*, so *in commodato æstimato*, it is in the debtor's option, whether to restore the thing itself entire, or the price at which it is estimated. But if the estimation be only in the case of the deterioration or loss, is doth no more but save questions as to the value, and is not *commodatum æstimatum;* or that the borrower hath applied the loan to another use than it was lent for; in which case it perisheth to him, yea, he committeth theft, in that misapplication. So if a fault precede, occasioning the accident, as if money lent for show, being carried abroad, be taken by robbers."[2]

§ 254. In the next place, as to the proper use of the thing by the borrower. It is very clear, that the lender has a right

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[1] Post, § 258.

[2] 1 Stair, Inst. B. 1, tit. 11, § 9; Ersk. Inst. B. 3, tit. 1, § 20, 21.

to prescribe the terms and conditions on which the loan shall be made. *Sicut autem* (says the Roman law) *voluntatis et officii magis, quam necessitatis est, commodare, ita modum commodati, finemque prescribere, ejus est, qui beneficium, tribuit.*[1] And the borrower is bound to follow these terms and conditions with all due fidelity.[2] If there is any excess in the nature, time, manner, or quantity of the use, beyond what may be fairly inferred to be within the intention of the parties, the borrower will (as we have already seen) be responsible, not only for any damages occasioned by such excess, but even for losses by accidents, which could not be foreseen, or guarded against.[3] As, if a man lends his friend a service of plate for an entertainment in a city, and he, without the knowledge or assent of the lender, carries it into the country, and it is there lost by accident, or otherwise, the borrower is responsible for the loss.[4] So, if the borrower is *in morâ*, as it is technically called, that is, if he is in default, as if he has omitted or refused to return the thing loaned, when it ought to have been returned, or after a due demand, he will be responsible for any subsequent loss thereof, although it may be occasioned by accident or the *vis major*.[5]

§ 255. In respect to the use, what is, or is not, within the scope of the bailment, must depend upon a great variety of implications and presumptions, growing out of the circumstances of each particular case; and no general rule can be laid down, which will govern all cases. In general, it may be said, in

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[1] Dig. Lib. 13, tit. 6, l. 17, § 3; Pothier, Prêt à Usage, n. 24.

[2] 1 Domat, B. 1, tit. 5, § 1, art. 8; Ante, § 232.

[3] Ante, § 188, 232, 233, 241; Post, § 396, 409, 413; Noy, Max. ch. 43; 2 Ld. Raym. 909, 915, 916; Jones on Bailm. 68, 69; Bac. Abridg. *Bailment*, C.; Bracton, lib. 3, ch. 2, § 1, p. 99; Pothier, Prêt à Usage, n. 21, 22, 57, 58, 60; Dig. Lib. 13, tit. 6, l. 18; Code Civil of France, art. 1880, 1881; Code of Louisiana of 1835, art. 2870; Booth *v.* Terrell, 16 Georgia, 25; Ante, § 232; 2 Kent, Comm. Lect. 40, p. 574, 4th edit.; Doctor and Student, Dial. 2, ch. 38.

[4] Jones on Bailm. 68, 69; Pothier, Prêt à Usage, n. 58; Dig. Lib. 13, tit. 6, l. 18; Ante, § 232.

[5] Pothier Prêt à Usage, n. 60; Pothier on Oblig. n. 627, 628 [n. 663 and 664 of the French editions]; Dig. Lib. 45, tit. 1, l. 82, § 2; Post, § 259; Jones on Bailm. 70.

the absence of all controlling circumstances, that the use intended by the parties is the natural and ordinary use to which the thing is adapted.[1] In regard to time, if no particular time is fixed, a reasonable time must be intended, keeping in view the objects of the bailment. If a horse is lent for a journey, it is presumed to be a loan for the ordinary time consumed in such a journey, making proper allowance for the ordinary delays and the ordinary objects of such a journey.[2] The place of the use must also be governed by circumstances. If A lends his horse to B to be used for a day, and both reside in the same town, it may be presumed that the use is to be within that town, unless there are some circumstances creating a different presumption of intention.

§ 256. If in using the thing, the borrower is put to any expense, this must be borne by himself.[3] Thus, for example, if a horse is lent to a friend for a journey, he must bear the expenses of his food during that journey, and of getting him shod, if he should chance to require it; for it is a burden which is naturally attendant upon the use of the horse. And this is according to the rule of the Roman law, where it is said: *Nam cibariorum impensæ, naturali scilicet ratione, ad eum pertinent, qui utendum accepisset.*[4] But if there are any extraordinary expenses incurred in the journey, as for curing the horse of a distemper, in such a case the Roman law and the foreign law, as we shall presently see, entitled the borrower to a remuneration from the lender.[5] But suppose, in consequence of the loan, the lender in the mean time is put to some trouble or expense; is the borrower to repay it? As if A lends his horse to B for a journey, and during the interval of his absence A is forced by some pressing business to hire another horse; is B responsible for the hire? Pothier thinks he is; and Sir William Jones

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[1] 1 Domat, B. 1, tit. 5, § 1, n. 8, 9, § 2, n. 11; Pothier, Prêt à Usage, n. 21; Bac. Abridg. *Bailment*, C.

[2] 1 Domat, B. 1, tit. 5, § 1, art. 10, § 2, art. 11.

[3] 1 Domat, B. 1, tit. 5, § 3, art. 4; Post, § 273; Pothier, Prêt à Usage, n. 24, 81.

[4] Dig. Lib. 13, tit. 6, l. 18, § 2.

[5] Post, § 273; Dig. Lib. 13, tit. 6, l. 18, § 2; Pothier, Prêt à Usage, n. 81.

has apparently adopted his reasoning.[1] No case in our law has decided such a point; and it would be extremely difficult to deduce it, as implied from the nature or obligations of the contract.

§ 257. As to the restitution of the thing lent. This is a most material part of the obligations of the borrower. He is to make a return of the thing at the time, and in the place, and in the manner contemplated by the contract.[2] He must also make a like return of all the increments and offspring of the thing lent.[3] *In deposito et commodato fructus quoque præstandi sunt.*[4] If no particular time is agreed on, then the party is to return it in a reasonable time. By the Roman law, and the foreign codes derived from it, the borrower is not bound to return the thing, until he has had the proper use of it, or until the bailment has terminated, although the thing is previously demanded by the lender.[5] The ground of this doctrine, as stated in the Roman law, is, that although it is purely a voluntary act to make the loan, and to prescribe the terms thereof; yet when once it is made, the lender would, by an unseasonable withdrawal of the loan, impose a burden, rather than a benefit, and thus violate the implied obligation between the parties: *Cum autem id fecit, id est, postquam commodavit, tunc finem præscribere, et retro agere, atque intempestive usum commodatæ rei auferre, non officium tantum impedit, sed et suscepta obligatio inter dandum accipiendumque. Adjuvari quippe nos, non decipi, beneficio oportet.*[6] Nor is the borrower even then obliged to return it in any other manner than was originally contemplated by the parties.[7] The same rule applies, although

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[1] Pothier, Prêt à Usage, n. 55; Jones on Bailm. 67.

[2] 1 Domat, B. 1, tit. 5, § 1, art. 11; Dig. Lib. 13, tit. 6, l. 5, § 1; Id. l. 17, § 3; Id. l. 3, § 1; Ante, § 255.

[3] See Booth *v.* Terrell, 16 Georgia, 25.

[4] Dig. Lib. 22, tit. 1, l. 28, § 1; Id. l. 38, § 10; Pothier, Prêt à Usage, n. 73, 74.

[5] Pothier, Prêt à Usage, n. 20, 24, 27, 76, 77; Ersk. Inst. B. 3, tit. 1, § 22.

[6] Dig. Lib. 13, tit. 6, l. 17, § 3; Pothier, Prêt à Usage, n. 24; 1 Domat, B. 1, tit. 5, § 3, art. 1.

[7] Pothier, Prêt à Usage, n. 20, 24; Dig. Lib. 13, tit. 6, l. 17, § 3; 1 Domat, B. 1, tit. 5, § 1, n. 13, § 3, n. 1; Code Civil, art. 1888; Post, § 271.

the lender has in the mean time had a necessity of using the same thing, if the occurrence might have been foreseen. But if it is a sudden and unexpected necessity, then the thing may be demanded back before the expiration of the time, unless the borrower will furnish a proper substitute, if the return will be to his injury.[1] So, if the purpose of the loan is accomplished, although the time has not expired, it may be demanded back again.[2] As if a manuscript is lent for a week to be copied, and the copy is made in two days, the lender may require the manuscript back, unless some other circumstance has intervened to justify the full delay.[3] However, where the loan is by its nature or character precarious, it may by the civil law be demanded at any time.[4] But even in such a case the demand must be made in a reasonable manner, and under reasonable circumstances, and so that no damage shall occur to the borrower;[5] for the rule of the Roman law is: *In omnibus Æquitas spectanda.*[6]

§ 258. These principles are not supposed to have any general foundation in the common law, in which the loan is understood, as to its continuance, to rest upon the good pleasure and good faith of the lender, and to be strictly precarious.[7] As the bailment is merely gratuitous, the lender may terminate it whenever he pleases.[8] But if he does so unreasonably, and it occasions any injury or loss to the borrower, the latter may, perhaps, have a suit for damages, where the object of the bailment has been partly accomplished; or if he retains the thing,

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[1] Pothier, Prêt à Usage, n. 25, 77.

[2] Id. n. 26.

[3] Id. n. 26, 27.

[4] 1 Domat, B. 1, tit. 5, § 1, 2, art. 13, § 3, art. 2; Pothier, Prêt à Usage, n. 86–90; Ante, § 227, 253 a; 1 Stair, Inst. B. 1, tit. 11, § 10.

[5] 1 Domat, B. 1, tit. 5, § 3, art. 2.

[6] Ibid.; Dig. Lib. 50, tit. 17, l. 90, 183.

[7] Ante, § 253; Post, § 277.

[8] Orser *v.* Storms, 9 Cowen, 687; Viner, Abridg. *Bailment*, D.; Bac. Abridg. *Bailment*, D.; Clark's case, 2 Leon. R. 30, 89; Lyte *v.* Peny, Dyer, 48 b; Harris *v.* Bervoir, Cro. Jac. 687; Id. 2 Roll. R. 440; Id. 38; Atkin *v.* Barwick, 1 Str. R. 165; Vin. Abridg. *Countermand*, A.; Sheppard's Epitome, *Countermand;* Taylor *v.* Lendley, 9 East, R. 49; 1 Dane, Abridg. ch. 17, art. 4, § 10.

and a suit is brought by the lender, he may insist upon the unreasonableness of the demand, or the injury to himself; and thus, perhaps, he may recoup in the damages whatever he has lost, and repel any claim for a large compensation, on account of his delay and refusal to return the thing bailed when it was demanded of him.

§ 259. If the borrower does not return the thing at the proper time, he is deemed to be in default, or, as the Roman law phrases it, *in morâ* (*en demeure*), and then he is responsible for all losses and injuries, and even for all accidents.[1] Sir William Jones has put as exceptions (in which he is apparently supported by Pothier), "Unless in cases where it may be strongly presumed that the same accident would have befallen the thing bailed, even if it had been restored at the proper time; or unless the bailee has legally tendered the thing, and the bailor has put himself *in morâ* by refusing to accept it."[2] The latter is a very clear case in the common law, as well as in the Roman law. But in the former case, the common law may, perhaps, be different, although the precise point has not been decided; for the refusal or delay puts the thing at the risk of the borrower, and is deemed such a misfeasance or negligence on his part, as will ordinarily make him liable for accidents.[3] The modern Code of France, and that of Louisiana,[4] as well as the Scottish law, make the borrower liable, in such a case, for all losses by accident.[5]

§ 260. The thing borrowed is not only to be returned, but

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[1] Jones on Bailm. 70; Pothier, Prêt à Usage, n. 60; Pothier on Oblig. n. 143, 144, 627, 628 [663, 664, of French editions]; Ante, § 254; Ersk. Inst. B. 3, tit. 1, § 22; 2 Kent, Comm. Lect. 40, p. 576, 4th edit.; Dig. Lib. 22, tit. 1, l. 32. See Clapp *v.* Nelson, 12 Texas, 373.

[2] Jones on Bailm. 70; Pothier, Prêt à Usage, n. 60; Pothier on Oblig. n. 143, 627 [n. 663 of the French editions]; Ante, § 122.

[3] Noye, Max. ch. 43; Jones on Bailm. 68; Coggs *v.* Bernard, 2 Ld. Raym. 909, 916; Doct. and Stud. Dial. 2, ch. 38. See Post, § 413, 413 a, &c., where this subject is more fully considered. Ante, § 122, 188.

[4] Code Civil of France, art. 1881; Code of Louisiana of 1825, art. 2870. See Dig. Lib. 30, tit. 1, l. 47, § 6; Dig. Lib. 16, tit. 3, l. 14, § 1; Dig. Lib. 10, tit. 4, l. 12, § 4; Dig. Lib. 6, tit. 1, l. 15, § 3.

[5] Ersk. Inst. B. 3, tit. 1, § 10.

every thing that is accessorial to it. Thus, the young of an animal, born during the time of the loan, is to be restored; and the income of stock, which has been lent to the borrower to enable him to pledge it, as a temporary security, also belongs to the lender.[1]

§ 261. In regard to the place where the thing is to be returned, several rules are found in the foreign law.[2] If no particular place is pointed out by the contract, it is to be returned to the lender at his usual dwelling-house, unless the thing properly belongs elsewhere. If the lender has in the mean time removed his domicile to another place, the borrower is not bound to follow it, and return the thing at the new residence; but he is bound only to return it at the former residence, unless, indeed, there is but a trifling difference in the distance between them.[3] The common law seems not to have

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[1] Dig. Lib. 13, tit. 6, l. 5; Ayliffe, Pand. B. 4, tit. 16, p. 518; Pothier, Prêt à Usage, n. 73, 74; Ante, § 238 a; Jones on Bailm. 66; Ante, § 194, 257.

[2] See also, Esmay *v.* Fanning, 9 Barbour, 189.

[3] Pothier, Prêt à Usage, n. 36, 37. The question as to the place where goods are to be delivered frequently arises under contracts for the sale and delivery of specific articles; and the adjudications upon that subject often afford useful illustrations in cases of gratuitous loans. Mr. Chancellor Kent, in his Commentaries (Vol. 2, Lect. 39, p. 506 to 509, 3d edit.), has summed up the doctrine in the following terms: "Lord Coke lays down the rule, that if the contract be to deliver specific articles, as wheat, or timber, the obligor is not bound to carry the same abroad, and seek the obligee (as in the case of payment of money), but he must call upon the obligee before the day, to know where he would receive the articles, and they must be delivered, or the obligor must be ready and able to make the delivery, at the place designated by the obligee. This doctrine was admitted in the case of Aldrich *v.* Albee (1 Greenl. R. 120,) in which it was declared, that if no place be mentioned in the contract to deliver specific articles (and which in that case were hay, bark, and shingles,) the creditor had the right to name the place. It is evident, however, that this rule must be received with considerable qualification; and it will depend, in some degree, upon the nature and use of the article to be delivered. The creditor cannot be permitted to appoint an unreasonable place, and one so remote from the debtor, that the expense of the transportation of the articles might exceed the price of them. If the place intended by the parties can be inferred, the creditor has no right to appoint a different place. But if no place of performance be designated, and none can be clearly inferred from collateral circumstances, it seems to have been again admitted, that the creditor may designate a reasonable place for the

laid down any special rules on this subject; but it has left the decision to be made upon the particular circumstances of each

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delivery of the articles. Mr. Chipman also states it as a rule of the common law, well understood and settled in Vermont, that if a note be given for cattle, grain, or other portable articles, and no place of payment be designated in the note, the creditor's place of residence at the time the note is given is the place of payment. The same rule is declared in New York, when the time, but not the place, of the payment of the portable article is fixed. If the article be not portable, but ponderous and bulky, then Lord Coke's rule prevails, and the debtor must seek the creditor, or get him to name a place. And if no place, or an unreasonable one, be named, the debtor may deliver the articles at a place which circumstances shall show to be suitable and convenient for the purpose intended, and presumptively in the contemplation of the parties, when the contract was made. There is a material difference in the reason of the thing between a tender of cumbersome goods, and those which are portable; and the same removal from one place to another is not equally required in the two cases. There is another class of cases, in which the position is assumed, that, if the parties have not designated any particular place of delivery, it is to be at the debtor's residence, or where the property was at the time of the contract; as in the case of a note, payable in farm produce, without mentioning time or place, the place of demand and delivery is held to be at the debtor's farm. It is likewise adjudged, that, where a person, in the character of bailee, promises to deliver specific goods on demand, though the demand may be made wherever he may be at the time, his offer to deliver at the place where the property is, or at his dwelling-house, or place of business, will be sufficient. If the debtor be present in person, or by his agent, and makes a tender of specific articles at the proper time and place, according to contract, and the creditor does not come to receive them, or refuses to accept them, the better opinion is, that, if the article is properly designated and set apart, the debt is thereby discharged. If the debtor be sued, he may plead the tender and refusal, and he will be excused by the necessity of the case from pleading uncore prist, and bringing the cumbersome articles into court. And it is not like the case of a tender of money, which the party is bound to keep good, and on a plea of tender to bring the money into court. The creditor is entitled to the money at all events, whatever may be the fate of the plea; and there is equal reason, that he should be entitled to the specific articles tendered. But in Weld *v.* Hadley (1 N. Hamp. R. 295,) it was decided, after a very able discussion, that, on a tender and refusal of specific articles, the property did not pass to the creditor. This was contrary to the doctrine declared in other cases; and the weight of argument, if not of authority, and the analogies of the law, would appear to lead to the conclusion, that, on a valid tender of specific articles, the debtor is not only discharged from his contract, but the right of property in the articles tendered passes to the creditor. The debtor may abandon the goods so tendered; but if he elects to retain possession of the goods, it is in the character of bailee to the

case, as it shall arise, according to the presumed intention of the parties.[1]

§ 262. It is wholly immaterial, whether the thing is returned to the lender, or to his authorized agent, or by the borrower, or by his agent.[2] If the thing has been properly delivered to the agent of the lender, the borrower will be discharged, although it never comes to the possession of the lender, by the fraud or neglect of the agent. *Commodatam rem missus qui repeteret, cum recipisset, aufugit. Si dominus ei dari jusserat, domino perit.*[3] But a mere delivery to the agent of the borrower will not discharge him, unless there is a complete return to the lender, or to his agent.[4]

§ 263. Perhaps, also, a delay in the return of the thing may, in some cases, be excused by the imminent danger of loss, if it had been sent at the stipulated time; for there must be an exercise of due diligence, as to the time and manner of return; and if the borrower takes undue hazards by returning the thing punctually (*ad punctum temporis*), he may be responsible for any loss occasioned by his rashness. Pothier holds, also, that the borrower is not bound to return it at the stipulated time, if thereby a great damage will accrue to himself.[5] So, if his refusal is solely to prevent the commission of a crime, he may stand excused. As if the lender desires his pistols to be returned, in order to kill another person.[6] Pothier also thinks, that the borrower may lawfully retain the thing beyond the stipulated time, if he has not entirely finished the business for which it was loaned, and if no injury will thereby occur to the lender. Nay, even if the lender would suffer some prejudice by the delay, if the borrower would suffer a greater prejudice by returning it, he holds that the borrower may re-

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creditor, and at his risk and expense." See also, Chipman on Contracts for Payment in Specific Articles, p. 25, 26, 27; Ante, § 117, and note.

[1] Ante, § 117, and note.

[2] Pothier, Prêt à Usage, n. 30, 31.

[3] Dig. Lib. 13, tit. 6, l. 12, § 1; Pothier, Pand. Lib. 13, tit. 6, n. 18; Pothier, Prêt à Usage, n. 41.

[4] Pothier, Prêt à Usage, n. 41.

[5] Pothier, Prêt à Usage, n. 42; Id. n. 26.

[6] Pothier, Prêt à Usage, n. 45.

tain it, making a due compensation to the lender.[1] Our law would reject these nice distinctions; and would require the return to be made at the stipulated period, if it could be made without undue hazards or criminality.

§ 264. The borrower cannot retain the thing borrowed for any antecedent debt due to him. This is the rule of the Roman and foreign law, as well as of the common law.[2] *Prætextu debiti restitutio commodati non probabiliter recusatur.*[3] The plain reason is, that it would be a departure from the tacit obligations of the contract. No intention to give a lien for a debt can be implied from the grant of a mere favor.

§ 265. In regard to the person to whom the thing is to be restored. Generally speaking, it is to be restored to the lender, or person entitled to the custody, unless it has been agreed that the restitution shall be some other person.[4] If the lender is dead, it is to be restored to his personal representative, if known.[5] If not known, or no administration is taken on his estate, the borrower may detain the thing, until an administration is made known. A restitution to or by an agent is, of course, the same thing as to the lender personally.[6] If the lender is a woman, and she afterwards marries, restitution is to be made to her husband, and not to her personally. So, if the lender has been put under guardianship, the return must be to his guardian.[7] And if the lender has become *non compos mentis*, or a lunatic, and has no guardian, a redelivery to him will not be good; but the thing must be kept, until a competent party exists, to whom it may be delivered.[8] But a redelivery to a minor will be good, if he has not any guardian appointed over him; and even if he has a guardian, if the thing has been usually intrusted to the minor by his guardian.[9]

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[1] Pothier, Prêt à Usage, n. 28.

[2] 1 Domat, B. 1, tit. 5, § 2, art. 13; Vin. Abridg. *Bailment*, B. 6; Pothier, Prêt à Usage, n. 44.

[3] Cod. Lib. 4, tit. 23, l. 4; Pothier, Prêt à Usage, n. 44.

[4] Pothier, Prêt à Usage, n. 31, 33.

[5] See Booth *v.* Terrell, 16 Georgia, 26.

[6] Ante, § 262.

[7] Pothier, Prêt à Usage, n. 33.

[8] Pothier, Prêt à Usage, n. 34.

[9] Pothier, Prêt à Usage, n. 35.

§ 266. Even if the lender is not the owner of the thing, the borrower must ordinarily restore it to him, and has no right to set up the title of a mere stranger against him; for the lender has, by his contract, a right to be reinstated in his possession.[1] However, if, in the mean time, a recovery has been had against the borrower without his default,[2] or if the thing has been attached in his hand in an adverse suit, that will constitute a sufficient excuse.[3] If the borrower actually restores the thing to the true and real owner, without any injury or injustice to the lender, he will no longer be liable to any action.[4] In like manner, if the thing is taken out of the possession of the borrower by the real owner,[5] or if, upon a threat by such owner to sue him, he has delivered up the thing to him, he will be discharged.[6]

§ 267. If the loan has been to several persons jointly, they are all responsible *in solido* (each for the whole), for the return; and of course, a return by one is a discharge of all, as a misuser by one is a misuser by all.[7] The French Code and the Code of Louisiana have in like manner made the joint borrowers responsible *in solido*.[8]

§ 268. As to the state or condition in which the thing is to be restored. The borrower not being liable for any loss or deterioration of the thing, unless caused by his own neglect of duty, or that of persons for whom he is responsible, it follows, that it is sufficient, if he returns it in a proper manner, and at the proper time, however much it may be deteriorated from accidental or other causes, not connected with any such neglect.[9] Thus, if the loss or deterioration shall have arisen from

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[1] Pothier, Prêt à Usage, *n.* 18, 46; Ante, § 230.

[2] Edson *v.* Weston, 7 Cowen, R. 278; Wilson *v.* Anderton, 1 Barn. & Adolph. R. 450; Ante, § 120. See Sheridan *v.* The New Quay Co. 3 J. Scott (N. S.), 650 and note.

[3] Pothier, Prêt à Usage, n. 46; Ante, § 120.

[4] Whittier *v.* Smith, 11 Mass. R. 211.

[5] Shelbury *v.* Scotsford, Yelv. R. 23.

[6] Wilson *v.* Anderton, 1 Barn. & Adolph. R. 450, per Littledale, J.

[7] Pothier, Prêt à Usage, n. 65.

[8] Code Civil of France, art. 1887; Code of Louisiana of 1825, art. 2876.

[9] Pothier, Prêt à Usage, n. 38, 40; Dig. Lib. 13, tit. 6, l. 19; Ante, § 240.

the wrongful act of a third person, which the borrower could neither foresee nor prevent, he will not be responsible therefor, any more than if it had happened by mere accident, or the *vis major;* for it is not possible, by any care or diligence, to guard against such an act. The Roman law states this doctrine in a very satisfactory manner. *Ad eos, qui servandum aliquid conducunt, aut utendum accipiunt, damnum injuriâ ab alio datum non pertinere, procul dubio est. Quâ enim curâ aut diligentiâ consequi possumus, ne aliquis damnum nobis injuriâ det?*[1] Nor will it make any difference, that the deterioration has arisen from the use made of it by the borrower, if that use is reasonable, and not beyond what was contemplated by the parties; for by the loan, the lender has taken upon himself to bear the loss consequent upon such a use.[2] Thus, if A lends B a cloak to wear on a journey from Boston to Washington and back again, the injury by the wear and tear of the journey must be borne by A.[3] So, if A lends B his horse for a long journey; and, by the natural fatigues of such a journey, the horse is injured, it is A's own loss.[4]

§ 269. By the Roman law, wherever the thing borrowed is returned in an injured or deteriorated state by the default of the borrower, the latter is responsible for all damages, notwithstanding the return, at least, if there has not been an express or implied waiver of any damages by the lender. *Si reddita quidem sit res commodata, sed deterior reddita, non videbitur reddita, quæ deterior facta redditur, nisi quod interest, præstetur. Proprie enim dicitur res non reddita, quæ deterior redditur.*[5] If the thing is materially damaged, the owner may refuse to receive it back; but it is otherwise, if the damage is inconsiderable.[6] By the common law, if the act by which the injury is occasioned is a mere negligence, the remedy would

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[1] Dig. Lib. 13, tit. 6, l. 19; Pothier, Prêt à Usage, n. 38.

[2] Pothier, Prêt à Usage, n. 39; Dig. Lib. 13, tit. 6, § 23.

[3] Pothier, Prêt à Usage, n. 39.

[4] Pothier, Prêt à Usage, n. 39; Dig. Lib. 13, tit. 6, l. 23; 1 Domat, B. 1, tit. 5, § 2, art. 6, 12.

[5] Dig. Lib. 13, tit. 6, l. 3, § 1; Pothier, Prêt à Usage, n. 69.

[6] Pothier, Prêt à Usage, n. 69, 70, 71.

be by an action on the case, in which damages for the injury only would be recoverable.[1] But wherever it amounts to a misfeasance and conversion of the property, there the owner is not bound to receive it back, but may recover the full value of it in a suitable action, as, for example, in an action of trover.[2] If he does receive it back, he will still be entitled to damages for the injury, in a like action, or an action on the case.[3] So, if the thing has been returned, but not at the proper time, the lender is entitled to recover damages for the delay.[4] If, by any improper use of the thing loaned, the borrower has made a profit, that profit also belongs to the lender.[5]

§ 270. In the next place, as to the obligations on the part of the lender. These, as the nature of a gratuitous loan would naturally lead us to presume, are few, and merely accessorial.

§ 271. In the Roman law, the first obligation on the part of the lender is, to suffer the borrower to use and enjoy the thing loaned during the time of the loan, according to the original intention, without any molestation or impediment, under the peril of damages. If he is not positively bound, like a letter to hire, to guarantee the use of the thing, he is at least bound to abstain from doing any act, by which the thing loaned may be less useful to the borrower: *Per se hæredemque suum non fieri, quo minus commodatorio uti liceat.*[6] And, therefore, if by any act of the lender the borrower is molested or impeded or injured in the use of the thing loaned during the stipulated period, he is by the Roman law entitled to an action for damages.[7] The modern nations of Continental Europe have

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[1] 1 Selw. N. P. 432, 11th edit.

[2] Ante, § 232.

[3] Bayliss *v.* Fisher, 7 Bing. R. 153; Paley on Agency, by Gow. 73, 74, n. (e); Id. by Lloyd, p. 70, 80; Syeds *v.* Hay, 4 Term R. 264; Peake, N. P. R. 49; Murray *v.* Burling, 10 Johns. R. 172; Gibbs *v.* Chase, 10 Mass. R. 125; Wheelock *v.* Wheelwright, 5 Mass. R. 104; Bowman *v.* Teall, 23 Wend. R. 306; Post, § 541, 578; Todd *v.* Figley, 7 Watts, R. 542.

[4] Pothier, Prêt à Usage, n. 72.

[5] Pothier, Prêt à Usage, n. 73.

[6] Pothier, Prêt à Usage, n. 20, 75, 76, 77; 1 Domat, B. 1, tit. 5, § 3, art. 1, 2; Dig. Lib. 13, tit. 6, l. 17, § 3; Ante, § 257.

[7] Dig. Lib. 13, tit. 6, l. 5, § 8.

adopted the same rule.[1] We have already seen, that by the common law the bailment may be terminated at the pleasure of the lender, and that it is always deemed a precarious loan.[2]

§ 272. But if, during the time of the use, a stranger molests or disturbs the borrower in the use, there the remedy of the borrower is solely against the stranger, and not against the lender, unless the stranger derives a title from the lender, or does the act by his connivance; or unless the loan is made in bad faith by the lender, knowing that the title is in the stranger, who will reclaim it.[3]

§ 273. Another obligation of the lender, by the Roman and foreign law, is to reimburse the borrower the extraordinary expenses to which he has been put for the preservation of the thing lent.[4] The borrower (as we have already seen), is compellable to bear the ordinary expenses; for, the loan being for his benefit, he must be presumed to engage to bear the burden as an incident to the use.[5] But the extraordinary expenses are at the risk of the lender.[6] Thus, if a horse is lent for a journey, the ordinary expenses of the horse on the journey are to be borne by the borrower. But if the horse is taken sick, the extraordinary expenses of the cure are to be paid by the lender. So, if the horse is stolen, the extraordinary expenses of pursuit and recapture are to be paid by the lender.[7] Upon the same reasoning, if a coach is lent for a journey, the ordinary repairs of a slight nature during the journey will belong to the borrower; but those of an extraordinary nature, as procuring a new wheel for one which has failed, will belong to the lender. In all these cases the borrower will have a lien on the thing, and detain it until these extraordinary expenses are paid; and the lender cannot, even by an

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[1] Pothier, Prêt à Usage, n. 78.

[2] Vin. Abridg. *Bailment*, D.; Bac. Abridg. *Bailment*, D.; Ante, § 257, 258; Post, § 277; Jones on Bailm. 45.

[3] Pothier, Prêt à Usage, n. 79, 80; Ante, § 266, 268.

[4] Pothier, Prêt à Usage, n. 81.

[5] Ante, § 256, 1 Domat, B. 1, tit. 5, § 3, art. 4.

[6] Pothier, Prêt à Usage, n. 81.

[7] Pothier, Prêt à Usage, n. 81; 1 Domat, B. 1, tit. 5, § 3, art. 4; Post, § 389.

abandonment of the thing to the borrower, excuse himself from the repayment. Nor is he excused by the subsequent loss of the thing by accident; nor by a restitution of it by the borrower, without insisting upon the repayment.[1]

§ 274. No case seems to have arisen in the common law, where this precise question has occurred in judgment. Probably, in such a case (for it cannot be asserted to be clear), in the absence of all countervening presumptions, if the repairs had conferred a permanent benefit upon the thing loaned, beyond the mere use for the journey, an obligation to reimburse the borrower to that extent might be implied. There might be more difficulty in regard to the cure of the sick horse, the expenses of which cure might reasonably be presumed to be a charge on the borrower within the scope of the contract, as necessary to his further use upon the journey.[2]

§ 275. Another case of implied obligation on the part of the lender, by the Roman law is, that he is bound to give notice to the borrower of the defects of the thing loaned; and if he does not, and conceals them, and an injury occurs to the borrower thereby, the lender is responsible.[3] The ground of this doctrine is, that when we lend we ought to confer a benefit, and not to do mischief. *Adjuvari quippe nos, non decipi, beneficio oportet.*[4] One case put in the Roman law is, where a party lends vitiated or defective casks, and the wine or oil put into them by the borrower leaks out, or is spoiled thereby, from want of notice of the defect, the lender is answerable. *Qui sciens vasa vitiosa commodavit, si ibi infusum vinum, vel oleum corruptum effusumve, condemnandus eo nomine est.*[5] A more stringent case would be, where a vicious horse is lent to put into a chaise for a ride, or drive, with a concealment of his defects, and thereby the chaise is broken to pieces, and the borrower is injured in his limbs. How our law would deal

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[1] Pothier, Prêt à Usage, n. 43, 82, 83; Dig. Lib. 13, tit. 6, l. 18, § 2, 4.

[2] Ante, § 121, 121 a, 256.

[3] Pothier, Prêt à Usage, n. 84.

[4] 1 Domat, B. 1, tit. 5, § 3, art. 3; Dig. Lib. 13, tit. 6, l. 17, § 3; Id. l. 18, § 3.

[5] Pothier, Prêt à Usage, n. 84; Dig. Lib. 13, tit. 6, l. 18, § 3; Pothier, Pand. Lib. 13, tit. 6, n. 26; 1 Domat, B. 1, tit. 5, § 3, art. 3.

with such cases, where there is no fraud in the concealment, does not appear to have been decided.[1]

§ 276. Another case of implied obligation on the part of the lender, in the Roman law, arises where the thing has been lost by the borrower, and, after he has paid the value thereof to the lender, the thing is restored to the lender. In such a case, the lender by that law must return to the borrower either the price paid, or the thing; for, by such payment of the loss, the property is effectively transferred to the borrower.[2] *Rem commodatam perdidi, et pro eâ pretium dedi, deinde res in potestate tuâ venit; Labeo ait, contrario judicio aut rem mihi præstare te debere, aut, quod à me accepisti, reddere.*[3] The result is the same, if a recovery of the full value is had by the lender in a suit against the borrower for an alleged conversion of the thing. In such a case the property, by a satisfaction of the judgment, is transferred to the borrower.[4] Under such circumstances, the borrower is deemed to be subrogated to the rights of action of the lender to recover the thing lost or injured, if found in the possession of any stranger; for, when he has paid the full value thereof, he has a clear right to have the beneficial interest secured to him.[5] The common law seems, for the most part, to recognize the same principles, although it would not, perhaps, be easy to cite any case of a gratuitous loan directly on the point.[6] Where the full price has been paid, or a judgment and satisfaction has been obtained for the full value of the thing lost, the common law treats the right of property as absolutely transferred to the borrower; and the lender has no such election as is given by the Roman

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[1] See Post, § 390, 391.

[2] Pothier, Prêt à Usage, n. 85; Dig. Lib. 13, tit. 6, l. 17, § 5.

[3] Dig. Lib. 13, tit. 6, l. 17, § 5; Pothier, Pand. Lib. 13, tit. 6, n. 27; Pothier, Prêt à Usage, n. 85.

[4] Pothier, Prêt à Usage, n. 68; Greenleaf on Evid. § 533. See Buckland *v.* Johnson, 26 Eng. Law & Eq. R. 328; and Bennett's note.

[5] Pothier, Prêt à Usage, n. 68.

[6] Adams *v.* Broughton, 2 Str. R. 1078; Lamine *v.* Dorrell, 2 Ld. Raym. 1216; Broome *v.* Wooton, Yelv. R. 67, and Mr. Metcalf's note (1); White *v.* Philbrick, 5 Greenleaf, R. 147, and Bennett's note to 2d edit.; Campbell *v.* Phelps, 1 Pick. R. 62; Post, § 414.

law, to return the money or price paid, and to receive back the thing loaned, if afterwards found.[1] Whether, in case the thing lost had a peculiar personal value, such as a present from a friend, a unique copy of a rare work, or a fine picture of an ancient master, if the value had been paid under the supposition of an absolute loss or destruction of the thing, the lender might not, upon an offer to return the value paid, be entitled to relief in equity for a restitution of it when found, is a point which may deserve consideration; since, under such circumstances, it may be open to the suggestion, that the settlement is founded upon a mistake, or is conditional merely; that is, that the lender will be content with the value only in case that the thing is never found. Pothier has also put the case, whether the borrower, also, after he has paid the price or value of the thing lost, is entitled, upon finding it again, to receive back the price or value paid upon tendering the thing to the owner; and he decides, that he is not so entitled; because in the mean time the owner may have supplied himself with another thing for the same purpose.[2]

§ 277. We next come to the consideration of the right or power of the lender to make a revocation of the loan. How far the lender may revoke the loan at his mere pleasure, has been already incidentally noticed;[3] and it seems, that by the common law all such loans are deemed precarious, and during the mere will and pleasure of the lender.[4] But there are also revocations implied by law, as by a change of the state or condition of the parties. Thus, the death of the borrower will ordinarily operate as a revocation of the loan; for it is presumed to be a matter of personal confidence and benefit.[5] But if such a presumption does not arise from the nature and circumstances of the loan, the Roman law deems the death of

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[1] Post, § 414.

[2] Pothier Prêt à Usage, n. 68.

[3] Ante, § 257, 258, 271.

[4] Orser *v.* Storms, 9 Cowen, R. 687; Putnam *v.* Wiley, 8 Johns. R. 432; Smith *v.* Miller, 1 Term R. 480.

[5] Pothier, Prêt à Usage, n. 27.

the party no revocation.[1] On the other hand, the death of the lender does not by the Roman law operate as a revocation of the loan, unless it is of the nature called precarious, or during pleasure.[2] The general analogy of the common law would lead us to the conclusion, that the death of either party would amount to a revocation of a gratuitous loan. Thus, if a woman, after a bailment made by her, or to her, contracts marriage, that operates as a termination or revocation of the bailment.[3]

§ 278. In this class of bailments, also, the question may arise, upon whom, in case of any damage or loss to the thing loaned, the burden of proof rests; whether upon the lender to establish the neglect of the borrower, which renders him responsible, or upon the latter to establish his innocence, and to show that the damage or loss has been without any neglect. Pothier, in several passages, intimates his own opinion to be, that the burden of proof is on the borrower.[4] This, also, is the doctrine of the Roman law. *In exceptionibus dicendum est, reum partibus actoris fungi oportere, ipsumque exceptionem, velut intentionem, implere*; (*id est, probare debere*).[5] It is, perhaps, not easy to lay down any absolute rule on this subject,

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[1] Pothier, Prêt à Usage, n. 27.

[2] 1 Domat, B. 1, tit. 5, § 1, art. 13.

[3] Vin. Abridg. *Bailment*, D.; Story on Agency, § 462, 480 to 500.

[4] Pothier, Prêt à Usage, n. 40, 41; Pothier on Oblig. n. 620 (n. 656 of the French editions). Pothier, in his work on Obligations, n. 620, uses the following language: "There remains a question upon this subject; where the debtor of a specific thing, who has not taken upon himself the risk of accidents, and is only answerable for his own neglect, alleges that the thing is lost without his fault, or by accident, is it incumbent on the creditor to prove, that the loss was occasioned by the fault of the debtor; or, on the other hand, must the debtor prove the accident, which he alleges to have taken place? I think that the proof is incumbent on the debtor. If the person, who asserts a claim, is obliged to show the foundation of that claim by proof, the other party is equally bound to prove what constitutes the foundation of his defence. The creditor, who demands payment of what his debtor has engaged to give him, ought to prove the credit which is the foundation of his demand. The debtor, who resists that demand, upon the plea that he is discharged by an accident which occasioned a loss of the thing due, should prove the accident which is the foundation of his defence." Ante, § 212, 213; Post, § 339, 410, 454, 529.

[5] Dig. Lib. 22, tit. 3. l. 19; Pothier on Obligations, n. 620 (n. 656, French editions).

as the rule of the common law, which might not be subject to some exceptions. Where a demand of the thing loaned is made, the party must return it, or give some account how it is lost. If he shows a loss, the circumstances of which do not lead to any presumption of negligence on his part, there the burden of proof might, perhaps, belong to the plaintiff to establish it. There are cases, at least, in which it has been held, that the plaintiff must prove the negligence under special circumstances.[1] But where there is a demand of the thing loaned, and a general refusal, without any special excuse stated or proved at the time of the demand, there the burden of proof would seem to be on the defendant, to negative the *primâ facie* right of recovery thus made out by the plaintiff.[2] And in many complicated cases of evidence, the burden of proof may alternately shift from one party to the other, in different stages of the trial.[3]

§ 279. There is another point, in respect to the rights of the lender and the borrower, which it may be of some importance to mention, although it has been somewhat considered under other heads. It is, who is to be deemed the owner or proprietor of the thing during the period of the loan, or, in other words, whether the borrower has a special property in it, or only a bare or naked possession. By the Roman law the lender still retains the sole proprietary interest, and nothing passes to the borrower, but a mere right of possession and user of the thing during the continuance of the bailment. Nay, the possession of the borrower is deemed the possession of the lender. *Rei commodatæ et possessionem et proprietatem retinemus; Nemo enim commodando rem facit ejus, cui commodat.* Such is the doctrine of the Roman law, as well as the Continental jurisprudence founded on it, in modern times.[4] The

[1] Harris *v.* Packwood, 3 Taunt. 264; Abbott, C. J., in Marsh *v.* Horne, 5 Barn. & Cress. 322; Platt *v.* Hibbard, 7 Cowen, R. 497, 500, note; Doorman *v.* Jenkins, 2 Adolph. & Ellis, R. 256, 259; Ante, § 64 a; Beardslee *v.* Richardson, 11 Wend. R. 25; Ante, § 212, 213, and note; Post, § 239, 410, 454, 529.

[2] Ante, § 212, 213, and note, 214.

[3] See ante, § 212–214; Post, § 339, 410, 454, 529.

[4] Dig. Lib. 13, tit. 6, l. 8, 9; Pothier, Prêt à Usage, n. 5, 9; Ayliffe, Pand. B. 4, tit. 16, p. 517; 1 Domat, B. 1, tit. 5, § 1, art. 4.

same rule seems to prevail in the common law; so that an action for a trespass or conversion will lie in favor of the lender against a stranger, who has obtained a wrongful possession, or has made a wrongful conversion of the thing loaned.[1] A mere gratuitous permission to a third person to use a chattel does not, in the contemplation of the common law, take it out of the possession of the owner, so as to prevent him from maintaining an action for any injury to it, or for any conversion of it by a third person.[2]

§ 280. But, notwithstanding the borrower has no special property in the thing loaned, still it seems, that, if the injury done by a stranger is of such a nature that the bailee would be liable over to the lender for it, the latter may maintain an action of trespass, and even of trover, founded upon his possession, to recover damages; for the mere possession of property without title is sufficient against a wrongdoer.[3] It has been affirmed by a learned Judge, that a simple bailee has a

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[1] Ante, § 93, 93 a, 94.

[2] Thorp *v.* Burling, 11 Johns. R. 285; Hurd *v.* West, 7 Cowen, R. 753; Orser *v.* Storms, 9 Cowen, R. 687; 2 Saund. R. 47 b, by Williams; Bac. Abridg. *Trespass*, C. 2; Id. *Trover*, C.; Smith *v.* Mills, 1 Term R. 480, Ashurst, J.; Lotan *v.* Cross, 2 Camp. R. 464; Putnam *v.* Wiley, 8 Johns. R. 432; Hoyt *v.* Gelston, 13 Johns. R. 141, 561; Nicolls *v.* Bastard, 2 Cromp. Mees. & Rosc. 659; Ante, § 93, 93 a to 94; 2 Kent, Comm. Lect. 40, p. 574, 4th edit. In Bac. Abridg. *Bailment*, C., it is said, in one place, that if a man lends another his sheep, oxen, or his cart, the borrower hath a qualified property in them, according to the purposes for which they were borrowed; and the Doctor and Student, Dial. 2, ch. 38, is cited. But there is nothing in the latter book as to the point of special property in the borrower. On the other hand, it is stated in Bac. Abridg. *Bailment*, C., in another place, that if a man lend another his sheep to stock his land, the borrower hath a bare use of them. But if he kill them, the owner shall have a general action of trespass, or an action of trover, at his election; for, though the use is in the borrower, yet the property is in the lender, and the killing of the sheep is an open violation of another's property. And for this is cited Co. Litt. 57, which supports the text. In Roberts *v.* Wyatt, 2 Taunt. R. 275, Lord Chief Justice Mansfield took a distinction between a special property and a temporary property upon a bailment. 2 Camp. R. 464; Ante, § 227, 258; Booth *v.* Terrell, 16 Georgia, 25; Jones on Bailm. p. 45.

[3] Hurd *v.* West, 7 Cowen, R. 753; Bac. Abridg. *Trespass*, C. 2; Burton *v.*

sufficient interest to sue in trover.[1] The same doctrine is laid down in Blackstone's Commentaries, in very strong and decided terms.[2] Indeed, it may now be affirmed, as a general doctrine, that, in cases of a simple bailment without reward, an action may be maintained, either by the bailor or by the bailee, for any wrong done to the bailee's possession.[3]

§ 281. There is a very loose note of a case before Lord Holt,[4] which contains two positions said to have been laid down by his Lordship on the subject of bailments, which may seem to require notice. One is, that if A bails the goods of C to B, and C brings detinue against B for them, the latter may plead the bailment to him by A to be redelivered to A and so bring in A as garnishee to interplead with C. It does not appear under what circumstances this opinion was expressed; and it is by no means clear, that in all cases such a plea would be good even for the purposes of interpleader at the common law, however the case may be in equity.[5] Generally speaking, a bailee cannot, as we have before seen, be in a better situation than the person from whom he has received the property.[6] If the latter has no title to detain the property against the owner, the bailee cannot do it; and his detention of it is a conversion.[7]

§ 282. The other position is, that if A bails goods to C, and afterwards transfers his whole right in them to B, B can-

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Hughes, 2 Bing. R. 173; Sutton *v.* Buck, 2 Taunt. R. 302; Rooth *v.* Wilson, 1 Barn. & Ald. 59; 2 Ld. Raym. 911; Barker *v.* Miller, 6 Johns. R. 195; Badlam *v.* Tucker, 1 Pick. R. 389, 395; Waterman *v.* Robinson, 5 Mass. R. 303; Bac. Abridg. *Bailment*, D.; 2 Black. Comm. 453; 1 Dane, Abridg. ch. 17, art. 9; Ante, § 93 a to 94.

[1] Burton *v.* Hughes, 2 Bing. R. 173, 175, per Lord Ch. J. Best. See also, Ogle *v.* Atkinson, 5 Taunt. R. 759; Hurd *v.* West, 7 Cowen, R. 753; Armory *v.* Delamirie, 1 Str. R. 505; Nicolls *v.* Bastard, 2 Cromp. Mees. & Rosc. 659.

[2] 2 Black. Comm. 453. See also, ante, § 93, 94, 150, 152.

[3] Nicolls *v.* Bastard, 2 Cromp. Mees. & Rosc. 659; Ante, § 93, 93 a to 94.

[4] Rich *v.* Aldred, 6 Mod. R. 216; Ante, § 103.

[5] Ante, § 110–112. See also, 2 Story on Eq. Jurisp. § 805 to 809; Id. § 814 to 820; 3 Reeves's Hist. of the Law, ch. 23, p. 453, 454.

[6] Wilson *v.* Anderton, 1 Barn. & Adolph. 450; Ante, § 102, 110.

[7] Ibid.

not maintain detinue for them against C, because the special property that C acquires by the bailment, is not thereby transferred to B.[1] This position also seems questionable. For if the bailment is a naked bailment, no special property passes to C; and what difficulty can there be in A's transferring his property to a thing in the possession of his agent or bailee? Even if a special property did pass to the bailee by a simple bailment, yet the bailment and special property would be determined by the sale and due notice thereof to the bailee; and the bailor would by the sale transfer the general property. Nothing is more common than a transfer by a principal of his property in goods in the hands of his factor; and no one doubts that it is a valid transfer, subject only to any lien which the factor may possess thereon. So, a transfer of goods, while at sea in the possession of the master of a ship, is deemed a valid transfer; and, if he refuses to deliver them upon a due demand and refusal, the vendee may maintain a suit against him for a recovery of them or their value. There is great reason, therefore, to suspect the accuracy of the report in both respects.

§ 283. We have already had occasion to notice the distinction between a *mutuum* and a *commodatum*. In the latter case, no special property passes to the borrower.[2] In the former case (a *mutuum*), the absolute property passes to the borrower, it being a loan for consumption, and he being bound to restore, not the same thing, but other things of the same kind.[3] Thus, if corn, wine, money, or any other thing which is not intended to be redelivered back, but only an equivalent in kind, is lost or destroyed by accident, it is the loss of the borrower; for it is his property, and he must restore the equivalent in kind;[4] and in such cases the general rule is: *Ejus est pericu-*

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[1] Ante, § 103.

[2] Ante, § 47.

[3] Jones on Bailm. 64; 2 Ld. Raym. 916; 1 Dane, Abridg. ch. 17, art. 11, 16; 1 Bell, Comm. § 197, 4th edit; 1 Bell, Comm. p. 255, 5th edit.; Ante, § 47, 228; Hurd *v.* West, 7 Cowen, R. 752, 756.

[4] Noy, Max. ch. 43; Jones on Bailm. 64, 102; Ante, § 47, 228; Pothier, Prêt de Consumption, n. 50; Pothier on Oblig. n. 622 (n. 658 of the French editions); Doct. and Stud. Dial. 2, ch. 38; Post, § 439.

lum, cujus est dominium.[1] In one case in New York, the accuracy of this doctrine seems to have been brought into doubt. There a person sent to a miller a quantity of wheat to be exchanged for flour, and the miller mixed it with a mass of wheat, of the same quality belonging to himself and others. Before the flour was delivered to the party, the mill with all its contents was destroyed by an accidental fire, without any fault or negligence of the miller. It was held by the Court, in a suit by the party who sent the wheat, that the miller was not responsible for the loss, and was not obliged to deliver the flour. The ground was, that the contract was not a sale of the wheat, and the property in it was not transferred to the miller.[2] Now, in this case, if the flour to be returned was to be that to be ground out of the specific wheat delivered, the decision of the Court stands upon acknowledged principle. But if other flour only, equal to that which would be ground out of wheat of a like kind and quality, was to be returned, it was a clear case of *mutuum*, and the defendant (the miller) was responsible; for the wheat, on the delivery, became his property. The latter would seem to have been the actual posture of the case. But the Court must have proceeded upon the ground that it was a bailment of hire.[3] The decision in the case has been pointedly disapproved, upon its own circumstances, by Mr. Chancellor Kent, in his Commentaries; and his opinion is supported by a later decision in the same State.[4] The common law is coincident with the Roman law on this point, as Sir William Jones has sufficiently pointed out.[5]

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[1] 1 Stair, Inst. B. 1, tit. 11, § 2.

[2] Seymour *v.* Brown, 19 Johns. R. 44. [This case has been overruled. See Smith *v.* Clarke, 21 Wend. R. 84; Pierce *v.* Schenck, 3 Hill, R. 28, 31, note (a); Baker *v.* Woodruff, 2 Barbour, Supreme Ct. (N. Y.) R. 520; Norton *v.* Woodruff, 2 Comstock, R. 153; Chase *v.* Washburn, 1 Ohio State R. 244; Mallory *v.* Willis, 4 Comst. 76; Wadsworth *v.* Allcott, 2 Selden, 64; Foster *v.* Pettibone, 3 Selden, 433.]

[3] The case of Slaughter *v.* Green, 1 Rand. Virg. R. 3, must be supported, if at all, upon the same ground. See Inglebright *v.* Hammond, 19 Ohio, R. 337.

[4] 2 Kent, Comm. Lect. 40, p. 589, 4th edit.; Hurd *v.* West, 7 Cowen, R. 752, 756, note; Buffum *v.* Merry, 3 Mason, R. 478; Ewing *v.* French, 1 Blackf. Indiana, R. 353; Post, § 439.

[5] Jones on Bailm. 102; Dig. Lib. 19, tit. 2, l. 31; Pothier, Pret à Consumption, n. 4, 5, 6, 13; Doct. and Stud. Dial. B. 2, ch. 38; Bac. Abridg. *Bailment*, C.

§ 284. In the Scottish law, there is a peculiar word, *fungible*, which is used to designate such articles as may be the subject of contracts of *mutuum*. A *fungible*, in that law, is defined to be any thing whatever which consists in quantity, and is regulated by number, weight, or measure, — such as corn, wine, or money; and it answers to the description, in the Roman law, of things of which there may be a *mutuum*, *quæ pondere, numero, et mensurâ constant.*[1] The word *fungible* is used in the French law to express the same notion. Both words are derived from the Latin word *fungibiles;* because (as Pothier says), *Earum naturi est, ut aliæ aliarum ejusdem generis rerum vice fungantur.*[2]

§ 285. Here ends the intended commentary on the Contract of Gratuitous Loans, a subject of daily occurrence in the actual business of human life. It has, however, furnished very little occasion for the interposition of judicial tribunals, for reasons equally honorable to the parties, and to the liberal spirit of polished society. The generous confidence thus bestowed is rarely abused; and if a loss or injury unintentionally occurs, an indemnity is either promptly offered by the borrower, or compensation is promptly waived by the lender.

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[1] 1 Bell, Comm. § 199, 4th edit.; 1 Bell, Comm. p. 255, 5th edit.; 1 Stair, Inst. B. 1, tit. 11, § 2, 4; Heinec. Elem. Pand. Lib. 12, tit. 1, § 3. Heineccius uses the same word to express the same things, "res fungibiles." Heinecc. Elem. Pand. P. 3, Lib. 12, tit. 1, § 5. Ayliffe, also, uses the word fungible. Ayliffe, Pand. B. 4, tit. 11, p. 481. Mutui datio (says the Roman law), consistit in his rebus, quæ pondere, numero, mensurâ, consistunt; quoniam eorum datione possumus in creditum ire, quia in suo genere functionem recipiunt per solutionem, quam specie. Dig. Lib. 12, tit. 1, l. 2, § 1; Pothier, Prêt de Consumption, n. 25; Ante, § 47.

[2] Pothier, Prêt de Consumption, n. 25. Pothier has devoted an entire treatise to the law arising out of the contract of mutuum. It does not seem to me, that in our law it requires any such distinct examination, as it falls under the general head of sale or barter, and is governed by the same general rules.

CHAPTER V.

ON PAWNS OR PLEDGES.

§ 286. HAVING gone through with the subject of gratuitous loans, we next come to the consideration of contracts of bailment, founded in the mutual benefit and interest of the parties. And first, of the contract of pledge, or pawn, for these words seem indifferently used in our law to express the same idea. Sir William Jones defines a pledge to be "a bailment of goods by a debtor to his creditor, to be kept till the debt is discharged."[1] Lord Holt defines it thus: "When goods or chattels are delivered to another as a pawn, to be security for money borrowed of him by the bailor; and this is called in Latin *vadium*, and in English a pawn or pledge."[2] In the Roman law it is properly called *pignus*, and is defined thus: *Pignus appellatum a pugno, quia res quæ pignori dantur, manu traduntur.*[3] And in that law the term was generally applied to mere personal property, or movable. *Unde etiam videri potest, verum esse, quod quidam putant, pignus propriæ rei mobilis constitui.*[4] In the Roman law, also, a pawn (*pignus*) was distinguished from an hypothecation (*hypotheca*) in

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[1] Jones on Bailm. 117; Id. 36; 1 Dane, Abridg. ch. 17, art. 4. My learned friend, Mr. Chancellor Kent, follows the definition of Sir William Jones. 2 Kent, Comm. Lect. 40, p. 577, 4th edit. See also, Halifax's Anal. of the Civil Law, 63. The definitions in the Scottish law do not essentially differ from that commonly given, except that the Scottish authors generally include in it a power of sale of the pledge, to satisfy the claims of the pledgee. See 2 Bell, Comm. § 701, 4th edit.; 2 Bell, Comm. p. 20, 5th edit.; Ersk. Inst. B. 3, tit. 1, § 33; 1 Stair, Inst. B. 1, tit. 13, § 11.

[2] Coggs *v.* Bernard, 2 Ld. Raym. 909, 913.

[3] Dig. Lib. 50, tit. 16, l. 238; Heinec. Elem. Pand. Lib. 20, tit. 1, § 2 to 5; Pothier, de Nantissement, n. 5.

[4] Dig. Lib. 50, tit. 16, l. 238; Heinec. Pand. Lib. 20, tit. 1, § 2 to 5; Pothier, de Nantissement, n. 5.

this, that in the former the possession was delivered to the pawnee; in the latter it was retained by the pawnor.[1] However the words *pignus* and *hypotheca* seem often to have been confounded; for it is said, *Inter pignus autem et hypothecam tantum nominis sonus differt.*[2] Pothier defines a pawn or pledge to be a contract by which a debtor gives to his creditor a thing to detain as security for his debt (*créance*), which the creditor is bound to return when the debt is paid. And he makes the like distinction between a pledge and an hypothecation, as is made in the Roman law.[3] The foregoing definitions are sufficiently descriptive of the nature of a pawn or pledge. They are, in terms, limited to cases where a thing is given as a mere security for a debt; but a pawn may well be given as security for any other engagement.[4] The definition of Domat is, therefore, more accurate, because it is more comprehensive; namely, that it is an appropriation of the thing given for the security of an engagement.[5] In the common law, it may be defined to be a bailment of personal property, as a security for some debt or engagement. In our language, the term pawn or pledge is ordinarily confined to personal property;[6] and where real or personal property is transferred by a conveyance of the title as a security, we commonly denominate it a mortgage.

§ 287. A mortgage of goods is, in the common law, distinguishable from a mere pawn. By a grant or conveyance of goods in gage or mortgage, the whole legal title passes conditionally to the mortgagee; and if the goods are not redeemed at the time stipulated, the title becomes absolute at law, although

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[1] Dig. Lib. 13, tit. 7, l. 9, § 2; Inst. Lib. 4, tit. 6, § 7; Pothier, de Nantissement, Art. Prelim. 1.

[2] Dig. Lib. 20, tit. 1, l. 5, § 1; Ayliffe, Pand. B. 4, tit. 18, p. 524; Halifax, Analysis of Civ. Law, 63.

[3] Pothier, de Nantissement, Art. Prelim. n. 2; Pothier, Pand. Lib. 13, tit. 7, n. 1. The Code of Louisiana of 1825 defines it thus: "The pledge is a contract, by which one debtor gives something to his creditor, as a security for his debt." Art. 3100.

[4] Isaac *v.* Clark, 2 Bulst. R. 306, &c.; Pothier, de Nantissement, n. 11.

[5] 1 Domat, B. 3, tit. 1, § 1, art. 1.

[6] Post, § 290.

equity will interfere to compel a redemption.[1] But in a pledge, a special property only, as we shall presently see, passes to the pledgee, the general property remaining in the pledgor.[2] There is also another distinction. In the case of a pledge of personal property, the right of the pledgee is not consummated, except by possession; and ordinarily, when that possession is relinquished, the right of the pledgee is extinguished, or waived.[3] But in the case of a mortgage of personal property, the right of property passes by the conveyance to the pledgee, and possession is not, or may not be, essential to create or to support the title.[4]

§ 288. There are few cases, if any, in our law, where an hypothecation, in the strict sense of the Roman law, exists; that is, a pledge without possession by the pledgee. The nearest approaches, perhaps, are the cases of holders of bottomry bonds, of material-men, and of seamen for wages in the merchant service, who have a claim against the ship, *in rem*. But these are rather cases of liens or privileges, than strict hypothecations. There are also cases, where mortgages of

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[1] Post, § 308 to 311. See 2 Story on Eq. Jurisp. § 1030, 1031; Parks *v.* Hall, 2 Pick. R. 206; Gordon *v.* Mass. Fire & Marine Ins. Co. 2 Pick. 249; Brown *v.* Bement, 8 Johns. R. 96; Ackley *v.* Finch, 7 Cowen, R. 290; Hart *v.* Ten Eyck, 2 Johns. Ch. R. 100; Peters *v.* Ballistier, 3 Pick. R. 495; Langdon *v.* Buel, 9 Wend. R. 80; Patchin *v.* Pierce, 12 Ib. 61.

[2] Ryall *v.* Rolle, 1 Atk. R. 167; Jones *v.* Smith, 2 Ves. jr. 378; Lickbarrow *v.* Mason, 6 East, R. 25; Cortelyou *v.* Lansing, 2 Cain. Err. 200; Badlam *v.* Tucker, 1 Pick. R. 389, 397; 2 Story on Eq. Jurisp. § 1030; 1 Dane, Abridg. ch. 17, art. 4, § 11; Conard *v.* Atlantic Ins. Co. 1 Peters, R. 449; Brownell *v.* Hawkins, 4 Barbour, Supreme Ct. (N. Y.), R. 491; Post, § 307.

[3] Jewett *v.* Warren, 12 Mass. R. 300. What constitutes a sufficient possession, is a matter sometimes of considerable nicety. Where logs in a boom on a river were pledged and shown to the pawnee at the time, the pledge was held as effectual as an actual delivery of property capable of personal possession, as it was all the possession which the logs were then capable of. See also, Wilson *v.* Little, 2 Comstock (N. Y.), R. 443.

[4] Per Wilde, J., in Homes *v.* Crane, 2 Pick. R. 610; Post, § 297, 299; Peters *v.* Ballistier, 3 Pick. R. 495; Langdon *v.* Buel, 9 Wend. R. 80; Ferguson *v.* Lee, Ib. 258; Patchin *v.* Pierce, 12 Ib. 61. In the case of Bonsey *v.* Amee, 8 Pick. R. 236, the Court said, that delivery is necessary to constitute a mortgage of a chattel. See also, Carrington *v.* Smith, 8 Pick. R. 419. But this seems contrary to the current of the authorities.

chattels are held valid, without any actual possession by the mortgagee; but they stand upon very peculiar grounds, and may be deemed exceptions to the general rule.[1] They either stand upon the positive provisions of some statute, or they are the result of some contract, stipulating for the possession of the mortgagor, under circumstances in which such possession is deemed compatible with good faith, and does not hold out false colors to creditors or purchasers.[2] In these cases, the Courts have recognized the general distinction, that a mortgage may be without possession; but that a pledge cannot be without possession.[3] But of this more will be said hereafter.

§ 289. Let us consider, then in the first place, what are the essential ingredients in the contract of pledge. It may be treated in the common law, as it is in the Roman law, as a contract founded in the law of nature, of reciprocal obligation, and of mutual benefit.[4]

§ 290. And first, as to the things which may be the subject of it. These are, ordinarily, goods and chattels; but money, debts, negotiable instruments, choses in action, [coupon bonds, payable to bearer,[5] shares in the stock of an incorporated company,[6]] and, indeed, any other valuable things of a personal nature, such as patent rights and manuscripts, may by the

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[1] Ward *v.* Sumner, 5 Pick. R. 59; Homes *v.* Crane, 2 Pick. R. 607; Post, § 294; Macomber *v.* Parker, 14 Pick. R. 505.

[2] McLachlan *v.* Wright, 3 Wend. R. 348; Divver *v.* McLaughlin, 2 Wend. R. 596; Langdon *v.* Buel, 9 Wend. R. 80; Gardner *v.* Adams, 12 Wend. R. 297; Barrow *v.* Paxton, 5 Johns. R. 258; Look *v.* Comstock, 15 Wend. R. 244; Randall *v.* Cook, 17 Wend. R. 53; Beekman *v.* Bond, 19 Wend. R. 444; Lewis *v.* Stevenson, 2 Hall, Rep. 63; Badlam *v.* Tucker, 1 Pick. R. 389; Macomber *v.* Parker, 14 Pick. R. 497, 505. The statutes of Massachusetts respecting registered mortgages of personal property seem in a great measure to have changed such mortgages into hypothecations. See Mass. Revised Statutes, 1836, tit. 6, ch. 74, § 5–7; Bullock *v.* Williams, 16 Pick. R. 33; Forbes *v.* Parker, 16 Pick. R. 462.

[3] Ward *v.* Sumner, 5 Pick. R. 59, 60; Homes *v.* Crane, 2 Pick. R. 607; Cortelyou *v.* Lansing, 2 Cain. Cas. in Err. 200, 202; Ante, § 287; Brown *v.* Bement, 8 Johns. R. 96; Barrow *v.* Paxton, 5 Johns. R. 258.

[4] Pothier, de Nantissement, n. 13 to 17.

[5] Morris Cord. Co. *v.* Fisher, 1 Stockton, 667.

[6] Wilson *v.* Little, 2 Comstock (N. Y.), R. 443.

common law, be delivered in pledge,[1] Of things not in existence, there cannot (as we shall presently see) be a technical pledge at the common law; and yet there may be an hypothecary contract, which will attach as a lien or pledge to them, as soon as they come into existence.[2]

§ 290 *a*. In the Roman law, it is said that nothing, but what is capable of a delivery to the pledgee, is deemed to be the proper subject-matter of a pledge. This would seem to be a natural result of the definition already stated from the Digest, where it is said: *Pignus appellatum, quia res quæ pignori dantur, manu traduntur.*[3] Hence, it is said by Pothier, that by the Roman law incorporeal things, such as debts and other choses in action, cannot become the subject-matter of a pledge; for, according to that law, they are incapable of any delivery. *Incorporales res traditionem et usucapionem non recipere, manifestum est.*[4] There are, indeed, other passages in the Digest, which seem to import a different rule. Thus, it is said: *Quod emptionem venditionemque recipit, etiam pignorationem recipere potest.*[5] And again: *Pignus contrahitur non solâ traditione, sed etiam nudâ conventione, etsi non traditum est.*[6] Pothier endeavors to reconcile these different passages by stating that the word *pignus* is sometimes used in a strict sense, and sometimes in a broad or general sense. In a strict sense, it includes only a pledge, where there has been a delivery, and which alone was recognized, *jure civili*, as a pledge; in a broad or general sense, *pignus* not only includes a strict pledge, but also agree-

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[1] Kemp *v.* Westbrook, 1 Ves. 278; Lockwood *v.* Ewer, 9 Mod. R. 278; s. c. 2 Atk. R. 303; McLean *v.* Walker, 10 Johns. R. 471, 475; Roberts *v.* Wyatt, 2 Taunt. R. 268; Jarvis *v.* Rogers, 13 Mass. R. 105; s. c. 15 Mass. R. 389; Bowman *v.* Wood, 15 Mass. R. 534; Cortelyou *v.* Lansing, 2 Cain. Err. 200; 1 Dane, Abridg. ch. 17, art. 4, § 11; Garlick *v.* James, 12 Johns. R. 146; Stearns *v.* Marsh, 4 Denio, R. 227.

[2] Macomber *v.* Parker, 14 Pick. R. 497; Post, § 290 a, 294.

[3] Ante, § 286, 290 a, 294; 2 Bell, Comm. § 704, 4th edit.; 2 Bell, Comm. p. 23, 5th edit.

[4] Dig. Lib. 41, tit. 1, l. 43, § 1; Pothier, de Nantissement, n. 6, and note (1).

[5] Dig. Lib. 20, tit. 1, l. 9, § 1; Pothier, Pand. Lib. 20, tit. 3, n. 1.

[6] Dig. Lib. 13, tit. 7, l. 1; Pothier, Pand. Lib. 20, tit. 1, n. 2; Id. tit. 3, n. 2, 4; Pothier, de Nantissement, n. 6, and note (1).

ments for a pledge, where there was not any delivery; but which agreement would be enforced by the prætor, *jure prætorio.*[1] Domat insists, that by the Roman law not only corporeal things but incorporeal things also, such as debts, actions, and other rights, might be pledged.[2] And there are passages in the Code, which support this view. *Nomen quoque debitoris pignorari et generaliter et specialiter posse, jam pridem placuit.*[3] But then it is added in the Digest: *Si convenerit, ut nomen debitoris mei pignori tibi sit, tuenda est a Prætore hæc conventio,*[4] which supports the distinction of Pothier. Pothier seems to think, that in the French law the same rule exists, as to the necessity of a delivery to perfect a pledge, as in the Roman law, and, therefore, that incorporeal things, such as debts, and choses in action, are not strictly capable of being conveyed in pledge.[5] However, they are in his opinion capable, by assignment, of being effectively used for the same purpose.[6] By the modern Code of France, to give a privilege or preference of payment to other creditors, it is necessary that there should be an act of pledge, either public, or under private signature, duly registered, containing a declaration of the sum due as well as the kind and nature of the things placed in pledge, or a statement of their quality, weight, and measure, where the matters exceed one hundred and fifty francs.[7] The like privilege attaches also upon incorporeal movables, such as movable debts, only where the pledge is by public act, or under private signature, also registered, and made known to the debtor, for the debt given in pledge.[8] By the law of Louisiana, a pledge may be not only of corporeal things, but also of incorporeal things, such as debts, and negotiable instruments, and other

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[1] Pothier, de Nantissement, n. 6, note (1); 1 Stair, Inst. B. 1, tit. 13, § 12.

[2] 1 Domat, B. 3, tit. 1, §. 1, art. 231, &c.

[3] Cod. Lib. 8, tit. 17, l. 4.

[4] Dig. Lib. 13, tit. 7, l. 18.

[5] Pothier, de Nantissement, n. 6, 8, 9.

[6] Pothier, de Nantissement, n. 6, and note; Post, § 297; 1 Domat, B. 3, tit. 1, § 1, art. 23; Ayliffe, Pand. B. 4, tit. 18, p. 527, 530, 542; Wood, Civ. Law, 219; Cod. Lib. 8, tit. 17, l. 4.

[7] Code Civil of France, art. 2074.

[8] Id. art. 2075.

securities and choses in action. But to give a privilege against third persons, a similar written act and registration and notice are necessary.[1] In the Scottish law, goods, wares, and commodities are deemed the proper subjects of a pledge. Negotiable securities, also, are deemed capable of becoming a pledge. But, strictly speaking, debts and choses in action are not so; although by being assigned, and the vouchers delivered, some benefit, by the right of retaining them, may indirectly be obtained.[2]

§ 291. It is not indispensable, that the pledge should belong to the pledgor; it is sufficient, if it is pledged with the consent of the owner.[3] And even without the consent of the owner, the thing may, as between the parties, be completely deemed a pledge, so that the pledgor himself cannot reclaim it, except on discharging the obligation; for it does not lie in his mouth to assert himself not to be the owner.[4] On the other hand, the pledgee cannot ordinarily resist the right of the pledgor to redeem it, under the like circumstances; for he has no right to set up the right of a third person (*jus tertium*) against him, unless, indeed, that third person enforces against him his own superior right of property.[5] To the same effect is the Roman law. *Is quoque, qui rem alienam pignori dedit, solutâ pecuniâ, potest pigneratitiâ experiri.*[6] Nay, a person holding it by a wrongful title, or even by a criminal title, as by theft, might insist upon his rights as a pledgor. *Si prædo rem pignori dederit, competit ei et de fructibus pigneratitia actio.*[7]

§ 292. By the pledge of a thing, not only the thing itself is pledged, but also, as accessory, the natural increase thereof. As,

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[1] Clay *v.* His Creditors, 9 Martin, R. 523, 525; Code of Louisiana of 1825, art. 3109, 3120 to 3125, 3127 to 3129, 3137.

[2] 2 Bell, Comm. § 702 to 705, 4th edit.; 2 Bell, Comm. p. 20 to 23, 5th edit.

[3] See Code of Louisiana of 1825, art. 3112.

[4] Pothier, de Nantissement, n. 7, 27, 28; Ayliffe, Pand. B. 4, tit. 18, p. 538; 1 Dane, Abridg. ch. 17, art. 4, § 7, 8; Jarvis *v.* Rogers, 13 Mass. R. 105; s. c. 15 Ibid. 389; Code of Louisiana of 1825, art. 3114; Post, § 340.

[5] Pothier, de Nantissement, n. 7, 27; Ante, § 102.

[6] Dig. Lib. 13, tit. 7, l. 9, § 4; Pothier, de Nantissement, n. 7.

[7] Dig. Lib. 13, tit. 7, l. 22, § 2; Pothier, de Nantissement, n. 7.

if a flock of sheep are pledged, the young, afterwards born, are also pledged.[1] The Roman law adopted this doctrine in its fullest extent. *Grege pignori obligato, quæ postea nascuntur, tenentur. Sed et si capitibus de cedentibus totus grex fuerit renovatus, pignori tenebitur.*[2] The law of Louisiana is to the same effect.[3]

§ 293. By the Roman law, certain things were prohibited from being put in pawn; such as the necessary apparel and furniture, beds, utensils, and tools of the debtor; his ploughs, and other utensils for tillage; things esteemed sacred in the Roman law; the benevolence, or pension, or bounty of a monarch; and the pay and emoluments of officers and soldiers.[4] With the exception of the last two cases which stand upon general principles of public policy.[5] The common law allows a debtor to pledge any of his property, whether it consist of necessaries, or other things.[6]

§ 294. By the Roman law, not only property of which the party was at the time in possession, or to which he had then a present title, might be pledged; but also property of which he had neither a present possession or a present title, and which might be acquired by him only *in futuro*. And when the title was so acquired *in futuro*, the right of the pledgee attached immediately upon it.[7] But in such cases it was more properly an hypothecation than a pledge. In our law, a pledge is strictly confined to property of which there may be a present possession and title, or in which there is a present vested right

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[1] 1 Domat, B. 3, tit. 1, § 1, art. 7 to 10; Dig. Lib. 20, tit. 1, l. 13, 29; Ayliffe, Pand. B. 4, tit. 18, p. 530.

[2] Dig. Lib. 20, tit. 1, l. 13; Pothier, Pand. Lib. 20, tit. 3, n. 14 to 17.

[3] Code of Louisiana (1825), art. 3135.

[4] 1 Domat, B. 3, tit. 1, § 1, art. 24 to 27; Cod. Lib. 8, tit. 17, l. 8; Ayliffe, Pand. B. 4, tit. 18, p. 527, 530.

[5] McCarthy *v.* Goold, 1 Ball & Beat. 389; Stone *v.* Lidderdale, 2 Anst. R. 533; Barwick *v.* Reade, 1 H. Bl. 627; Flarty *v.* Odlum, 3 Term R. 681; Lidderdale *v.* Montrose, 4 Term R. 248.

[6] Ayliffe, Pand. B. 4, tit. 18, p. 542.

[7] 1 Domat, B. 3, tit. 1, § 1, art. 2, 5, 6, 20; Dig. Lib. 20, tit. 1, l. 1, 15; Ayliffe, Pand. B. 4, tit. 18, p. 530. The Code of Louisiana of 1825, art. 3111, is to the same effect.

or interest. But although, by the common law, there cannot be a technical pledge of property not then in existence, or to be acquired *in futuro*, yet there may be a contract for an hypothecation thereof; and when the title is acquired, or the property comes into existence, the right of the pledgee will immediately attach to it. Thus, for example, where a brick-maker stipulated with the lessees of a brickyard, in which he manufactured bricks, that the lessees should retain the bricks to be made there, as security for their advances to him, it was held, that the bricks became pledged, under the contract, as fast as they were manufactured.[1]

§ 295. If the pledgor has only a limited title to the thing, as for life, or for years, he may still pawn it to the extent of his title; but when that expires, the pledgee must surrender it to the person who succeeds to the ownership.[2] The same rule applies to any other special interest or special property in a thing; such, for example, as a lien or a right by a former pledge, which may be again pledged to the extent of such right or lien, although not beyond it.[3]

§ 296. In respect to negotiable instruments for money, the party who has a lawful possession of them, although he is not the owner, has generally the power of pledging them, as well as of selling them absolutely, so as to bind the rights of the owner.[4] But it seems otherwise in relation to negotiable securities for goods, such as bills of lading; for a factor, having a lawful possession of a bill of lading of goods under an assignment, may sell them; but ordinarily he has no authority to pledge them.[5]

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[1] Macomber *v.* Parker, 14 Pick. R. 497, 505, 509; Ante, § 290. It is not easy to reconcile the doctrine of this case, in some of its bearings, with that of Bonsey *v.* Amee, 8 Pick. R. 236. See Goodenow *v.* Dunn, 21 Maine, R. 86.

[2] Hoare *v.* Parker, 2 Term R. 376; Hooper *v.* Ramsbottom, 4 Camp. R. 121; McCombie *v.* Davies, 7 East, R. 5; 1 Dane, Abridg. ch. 17, art. 4, § 7; 1 Domat, B. 3, tit. 1, § 3, art. 25.

[3] Story on Agency, § 113; Post, § 322, 324 to 327; 1 Bell, Comm. § 412, 4th edit. (n. 5); 1 Bell, Comm. p. 482, 483, 5th edit.

[4] Jarvis *v.* Rogers, 13 Mass. R. 105; s. c. 15 Mass. R. 389; 2 Bell, Comm. § 704, 4th edit.; Post, § 322, 323.

[5] Abbott on Shipp. P. 3, ch. 9, § 19; Story on Agency, § 113, and note; Id.

§ 297. Secondly. It is of the essence of the contract, that there should be an actual delivery of the thing to the pledgee.[1] Until the delivery of the thing, the whole rests in an executory contract, however strong may be the engagement to deliver it; and the pledgee acquires no right of property in the thing.[2] What will amount to a delivery of the thing is, in many cases, matter of law. There need not be an actual manual delivery of the thing. It is sufficient, if there are any of those acts or circumstances which, in construction of law, are deemed sufficient to pass the possession of the property. Thus, goods at sea may be passed in pledge by a transfer of the muniments of title; as by a transfer of the bill of lading, or by a written assignment thereof. So goods in a warehouse may be transferred by a symbolical delivery of the key thereof;[3] [and a pledge of stock in an incorporated company may be created by a written transfer, by which the legal title passes to the creditor[4]]. So, if the pledgee has the thing already in possession, as by a deposit, or a loan, there the very contract transfers to him, by operation of law, a virtual possession thereof, as a pledge, the moment the contract is completed.[5]

§ 298. In the Roman law, although a delivery of the thing

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§ 225; Post, § 323, 325 to 328; Code of Louisiana of 1825, art. 3119. See the late statute of 6 Geo. 4, ch. 94, and 7 & 8 Geo. 4, ch. 29, enabling factors, in certain cases, to pledge the goods of their principals; 2 Kent, Comm. Lect. 41, p. 627, 628, and note (a), 4th edit.; Sumner *v.* Hamlet, 12 Pick. R. 76, 81.

[1] Ante, § 290; 2 Kent, Comm. Lect. 40, p. 581, 4th edit.; Cortelyou *v.* Lansing, 2 Cain. Cas. in Err. 200, 202; Code of Louisiana of 1825, art. 3119, 3120, 3129; Homes *v.* Crane, 2 Pick. R. 610; Ante, § 287; Bonsee *v.* Amee, 8 Pick. R. 236; Lee *v.* Bradlee, 8 Martin, R. 20. See also, Succession of Hiligsberg, 1 Louisiana, Ann. Rep. 340.

[2] Pothier, de Nantissement, n. 6, and note (1); Id. n. 8, 9; Portland Bank *v.* Stubbs, 6 Mass. R. 422; Tucker *v.* Buffington, 15 Mass. R. 477; Gale *v.* Ward, 14 Mass. R. 352; Cortelyou *v.* Lansing, 2 Cain. Cas. in Err. 200; 2 Kent, Comm. Lect. 40, p. 581, 4th edit.; Bac. Abridg. *Bailm.* B.; Wood *v.* Churley, 2 Roll. R. 439.

[3] Atkinson *v.* Maling, 2 Term R. 462. See also, Jewett *v.* Warren, 12 Mass. R. 300; Badlam *v.* Tucker, 1 Pick. R. 389, 396; Whitaker *v.* Sumner, 20 Pick. R. 405; Tuxworth *v.* Moore, 9 Pick. R. 347, 349.

[4] Wilson *v.* Little, 2 Comstock (N. Y.), R. 443.

[5] Pothier, de Nantissement, n. 9.

took place in cases of a strict pledge (*pignus*), yet, as has been already stated, in the case of an hypothecation, no such delivery or possession was necessary.[1] An hypothecation had the complete effect to transfer and vest a title in the thing, if that was the intention of the parties, upon the mere execution of the contract, although no possession was given, or it was even stipulated not to be given. This part of the Roman law seems not to have been absolutely adopted, in respect to movables, by any of the States of modern Europe; and it has been silently suppressed, or restricted within very narrow bounds, by their anxious desire to promote the interests of commerce. In none of these States is the hypothecation of movables allowed to prevail (as it did at Rome), against a subsequent *bonâ fide* purchaser; and in many of these States it is void, even against personal creditors.[2] This is true in respect to the law of Scotland and the law of France, which agree with the common law of England in making void all hypothecations of movables without a delivery, so far as regards creditors,[3] with the exception of a few privileged cases of tacit hypothecations; such as that of seamen for their wages, and of material-men for their supplies to foreign ships.[4]

§ 299. As possession is necessary to complete the title by pledge, so, by the common law, the positive loss, or the delivery back, of the possession of the thing with the consent of the pledgee, terminates his title.[5] However, if the thing

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[1] Ante, § 286.

[2] 2 Bell, Comm. § 703, 707, 4th edit.; 2 Bell, Comm. p. 25, 5th edit., and the authorities there cited; 1 Stair, Inst. B. 1, tit. 13, § 14.

[3] 2 Bell, Comm. § 702, 703, 707, 4th edit.; 2 Bell, Comm. p. 25, 5th edit.; Emerigon, Traité à la Grosse Aventure, ch. 12, § 1; 1 Valin, Comm. 341; 2 Kent, Comm. Lect. 40, p. 581, 4th edit.; Pothier, de Nantissement, n. 26. But see Code Civil of France, art. 2074 to 2077.

[4] 2 Bell, Comm. § 708, 719 to 724, 4th edit.; 2 Bell, Comm. p. 25 to 27, 5th edit.; 1 Stair, Inst. B. 1, tit. 13, § 14; Ersk. Inst. B. 3, tit. 1, § 34; Emerigon, Traité à la Grosse Aventure, ch. 12, Introd.; Id. § 1, 2. See Code of Louisiana, art. 3256, 3272; Malcolm *v.* Schooner Henrietta, 7 Louis. R. 488, 490, 491, 492.

[5] Per Wilde, J., in Homes *v.* Crane, 2 Pick. R. 607; Jarvis *v.* Rogers, 15 Mass. R. 389, 397; Sumner *v.* Hamlet, 12 Pick. R. 76, 81; Ante, § 287; Bon-

is delivered back to the owner for a temporary purpose only, and it is agreed to be redelivered by him, the pledgee may recover it against the owner, if he refuses to restore it after the purpose is fulfilled.[1] [In like manner if the pledgor recover possession of the pledge wrongfully, without the consent of the pledgee, this does not terminate the bailment.[2]] So, if it is delivered back to the owner in a new character, as, for example, as a special bailee, or agent. In such a case, the pledgee will still be entitled to the pledge, not only as against the owner, but also as against third persons; for, under such circumstances, the possession is perfectly consistent with the existence of the original right of the pledgee.[3] But if the pledgee voluntarily, by his own act, places the pledge beyond his own power to restore it, as by agreeing that it may be attached at the suit of a third person, that will amount to a waiver of his pledge.[4] And in like manner, it may, under the like circumstances, be recovered from a *bonâ fide* holder for value; for the possession of the pledgor will be deemed a continuance of the possession of the pledgee.[5] In the civil law, it was competent for the creditor, after the constitution of a pledge by delivery, to restore the thing to the possession of the pledgor, either on hire, or under any other contract, without impairing his right. *Si pignus mihi traditum locassem domino, per locationem retineo possessionem; quia antequam conduceret debitor, non fuerit ejus possessio; cum et animus mihi*

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sey *v.* Amee, 8 Pick. R. 236; Look *v.* Comstock, 15 Wend. R. 244; Reeves *v.* Capper, 5 Bing. N. C. 136; Ryall *v.* Rolle, 1 Atk. R. 165; Post, § 364. See Grinnell *v.* Cook, 8 Hill, R. 483.

[1] Roberts *v.* Wyatt, 2 Taunt. R. 268; 1 Domat, B. 3, tit. 1, § 1, art. 30; Ante, § 58; Pothier, Traité de Dépôt, n. 4; Story on Agency, § 367 to 370.

[2] Walcott *v.* Keith, 2 Foster, 196.

[3] Macomber *v.* Parker, 14 Pick. R. 497, 505, 509. The opinion of the Court in this case, delivered by Mr. Justice Putnam, is very able, and will reward a diligent perusal. See also, Hays *v.* Riddle, 1 Sandford, Superior Court (N. Y.), 248.

[4] Whitaker *v.* Sumner, 20 Pick. R. 399; Arendale *v.* Morgan, 5 Sneed, 704.

[5] Reeves *v.* Capper, 6 Bing. N. C. 136. [But see contra, Bodenhammer *v.* Newson, 5 Jones (N. C.), 107; Smith *v.* Sasser, 4 Id. 43. So it is held that a creditor of the pawnee may attach and sell the property if redelivered to the pawner. Barrett *v.* Cole, 4 Id. 40.]

retinendi sit, et conducenti non sit animus possessionem adipiscendi.[1] But this principle has not, from its inconvenience generally, found its way into the modern jurisprudence of Continental Europe, at least, not without many restrictions.[2]

§ 300. Thirdly. It is of the essence of the contract, that the thing should be delivered as a security for some debt or engagement. But it is of no consequence whether the debt or engagement, for which the security is given, is that of the pledgor, or of some other person; for if there is an assent by all the proper parties, it is equally obligatory in each case.[3] It may be delivered as security for a future debt, or engagement, as well as for a past debt;[4] for one or for many debts and engagements; upon condition, or absolutely; for a limited time, or for an indefinite period.[5] It may also be implied from circumstances, as well as arise by express agreement;[6] and it matters not what is the nature of the debt or the engagement.[7] The contract of pledge is not confined to an engagement for the payment of money; but it is susceptible of being applied to any other lawful contract whatever.[8]

§ 301. In all cases the pledge is understood to be a secu-

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[1] Dig. Lib. 13, tit. 7, l. 37.

[2] Dig. Lib. 20, tit. 1, l. 37; 2 Bell, Comm. § 703, 706, 707, 4th edit.; 2 Bell, Comm. p. 22, 5th edit.; Emerigon, Traité à la Grosse Aventure, ch. 12, § 1, 2; Ante, § 295, 298; 2 Kent, Comm. Lect. 40, p. 581, 4th edit.; Voet ad Pand. Lib. 20, tit. 1, § 12; Sumner *v.* Hamlet, 12 Pick. R. 76, 81; Jones *v.* Baldwin, 12 Pick. R. 316, 320; Macomber *v.* Parker, 14 Pick. R. 497, 505 to 510; Look *v.* Comstock, 15 Wend. R. 244.

[3] Pothier, de Nantissement, n. 16; 1 Domat, B. 3, tit. 1, § 1, art. 32, 33.

[4] Badlam *v.* Tucker, 1 Pick. R. 398; Holbrook *v.* Baker, 5 Greenl. R. 309; D'Wolf *v.* Harris, 4 Mason, R. 515; Conard *v.* Atlantic Ins. Co. 1 Peters, R. 448; Stearns *v.* Marsh, 4 Denio, R. 227.

[5] United States *v.* Hooe, 3 Cranch, R. 73; Shirras *v.* Caig, 7 Cranch, R. 34; 2 Johns. Ch. R. 309; Pothier, de Nantissement, n. 12; Dig. Lib. 13, tit. 7, l. 11, § 2; *Ex parte* Ockenden, 1 Atk. R. 236; Prec. Ch. 419; Coles *v.* Jones, 2 Vern. R. 691; Demainbray *v.* Metcalfe, Id. 698; Gilb. Eq. R. 104; Stevens *v.* Bell, 6 Mass. R. 339; Pothier, Pand. Lib. 20, tit. 1, n. 7–9.

[6] Heinecc. Pand. P. 4, Lib. 20, tit. 1, § 7; 1 Domat, B. 3, tit. 1, § 1, art. 2–4; Ayliffe, Pand. B. 4, tit. 18, p. 528.

[7] 1 Domat, B. 3, tit. 1, § 2, art. 3, 5.

[8] 1 Domat, B. 3, tit. 1, art. 2–4; Pothier, Pand. Lib. 20, tit. 1, n. 7–9.

rity for the whole and for every part of the debt or engagement, unless it is otherwise stipulated between the parties.[1] The payment or discharge of a part, therefore, still leaves it a perfect pledge for the residue of the debt or engagement. *Individua est pignoris causa*, is the language of the civilians.[2]

§ 302. As to the persons by whom, and between whom, the contract may be made, a few words will suffice. All persons, having a general capacity to contract, may enter into this engagement. But persons under disabilities are affected by the like incapacity in this, as in other cases of contract.[3] Married women, idiots, lunatics, and persons *non compotes* from age, debility, or otherwise, are wholly unable to make a valid pledge, or, indeed, to receive one. But, in respect to minors, it may be otherwise; for their contracts are generally not void, but voidable only, and are to be avoided only at their own election.[4]

§ 303. The next inquiry to which the subject leads, is as to the rights and duties of the pawnee or pledgee. (1) As to his rights. In virtue of the pawn, the pawnee acquires, by the common law, a special property in the thing,[5] and is entitled to the exclusive possession of it, during the time and for the objects for which it is pledged. If the owner should wrongfully repossess himself of the pawn, the pawnee may maintain a suit for the restitution of the thing itself, or for damages, at his election.[6] If it should be taken from his

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[1] Pothier, de Nantissement, n. 46; Code Civil of France, art. 2082, 2083; Code of Louisiana of 1825, art. 3130, 3131.

[2] Pothier, de Nantissement, n. 43, 46; Ayliffe, Pand. B. 4, tit. 18, p. 533; 1 Domat, B. 3, tit. 1, § 1, art. 18; Pothier, Pand. Lib. 20, tit. 6, n. 1, 2; Code of Louisiana of 1825, art. 3130, 3131.

[3] See Ante, § 50, 162, 229; Post, § 380.

[4] See Tucker *v.* Moreland, 10 Peters, R. 58; Keane *v.* Boycott, 2 H. Black. 515; 2 Kent, Comm. Lect. 31, p. 234 to 237, 4th edit.

[5] 2 Black. Comm. 396; Jones on Bailm. 80; Cortelyou *v.* Lansing, 2 Cain. Cas. in Err. 202; Garlick *v.* James, 12 Johns. R. 146; Mores *v.* Conham, Owen, R. 123, 124; Ratcliff *v.* Davis, 1 Bulst. R. 29; s. c. Yelv. R. 178; Cro. Jac. 244; Coggs *v.* Bernard, 2 Ld. Raym. 909, 916; Bac. Abridg. *Bailment*, B.; 1 Dane, Abridg. ch. 17, art. 4, § 1, 6; 2 Kent, Comm. Lect. 40, p. 578, 585, 4th edit.; 1 Bell, Comm. § 200, 4th edit.; 2 Bell, Comm. § 701, 4th edit.; Whitaker *v.* Sumner, 20 Pick. 399, 405; Jones *v.* Baldwin, 12 Pick. R. 316; Post, § 380.

[6] Gibson *v.* Boyd, 1 Kerr (New Brunswick), R. 150.

possession by a stranger, he may sue the stranger in the like manner.[1] And in a suit for damages, the pawnee may recover against a stranger the full value of the thing, although it is pledged to him for less, as he will be answerable over to the owner for the excess.[2]

§ 304. If there are any subsequent accessorial engagements, which are intended by the parties, either tacitly or expressly, to be attached to the pledge, the pledgee has a title and right of possession, coextensive with the new engagements.[3] But the mere existence of a former debt due to the pledgee does not authorize him to detain the pledge for that debt, when it has been put into his hands for another debt or contract, unless there is some just presumption that such was the intention of the parties.[4] The like rule applies to a subsequent debt or loan contracted by the pledgor; for in such a case, the new debt or loan will not be deemed to attach to the pledge, so that the pledgee may retain the same therefor, unless, from all the circumstances, there is just ground of presumption, that the new debt or loan was made upon the credit of the pledge, and was so understood by the parties.[5] The rule, in all these cases, strictly applies, that the particular contract is to govern the rights of the parties. *Modus et conventio vincunt legem.*

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[1] 2 Saund. R. 47, Williams's note; Woodruff *v.* Halsey, 8 Pick. R. 333; 2 Kent, Comm. Lect. 40, p. 585, 4th edit.; Story on Agency, § 367 to 370; Gibson *v.* Boyd, 1 Kerr, 150.

[2] Lyle *v.* Barker, 5 Binn. R. 457; Harker *v.* Dement, 9 Gill, 7; Benjamin *v.* Stremple, 13 Illinois, 466.

[3] Demandray *v.* Metcalf, Prec. Ch. 419; s. c. 2 Vern. R. 691; 2 Story on Eq. Jurisp. § 1034.

[4] Jarvis *v.* Rogers, 15 Mass. R. 389, 397, 414; Green *v.* Farmer, 4 Burr. 2214; Walker *v.* Birch, 6 Term R. 258; Rushforth *v.* Hadfield, 7 East, R. 224; Allen *v.* Megguire, 15 Mass. R. 490; 2 Kent, Comm. Lect. 40, p. 584, 585, 4th edit.; Demandray *v.* Metcalf, Prec. Ch. 419; s. c. 2 Vern. R. 691; 2 Story on Eq. Jurisp. § 1034.

[5] 2 Kent, Comm. Lect. 40, p. 584, 4th edit.; 4 Kent, Comm. Lect. 58, p. 175, 4th edit.; 2 Story on Eq. Jurisp. § 1010, 1034; Jarvis *v.* Rogers, 15 Mass. R. 389, 397, 414; Gilliat *v.* Lynch, 2 Leigh, R. 493; Demandray *v.* Metcalf, Prec. Ch. 419; s. c. 2 Vern. 691; *Ex parte* Ockenden, 1 Atk. R. 236; Jones *v.* Smith, 2 Ves. jr. 372; Vanderzee *v.* Willis, 3 Bro. Ch. R. 21. But see Adams *v.* Claxton, 6 Ves. 226.

§ 305. The rule of the Roman law is generally supposed to be different, and to justify the pawnee in insisting upon being paid all the debts due to him, whether those debts are secured by the pledge or not, before he is called upon to deliver it up. *Si in possessione fueris constitutus, nisi ea quoque pecunia tibi a debitore reddatur vel offeratur, quæ sine pignore debetur, eam restituere, propter exceptionem doli mali, non cogeris. Jure enim contendis, debitore eam solam pecuniam, cujus nomine pignora obligaverunt, offerentes, audiri non oportere, nisi pro illâ etiam satisfecerint, quam mutuam simpliciter acceperunt.*[1] This, however, is at most but a general rule, founded in the presumed intention of the parties; for if the parties otherwise agree, their own stipulation will prevail.[2] *Si in sortem duntaxat, vel in usuras obstrictum est pignus, eo soluto propter quod obligatum est, locum habet pigneratitia.*[3] So that, after all, it may, perhaps, be doubtful, whether the rule of the Roman law was intended to apply to any cases except those in which there was a natural implication or *primâ facie* presumption, that the subsequent debts should, by the consent of the parties, be tacked to the preceding.[4] Pothier, however, deems the Roman law clear on this point of retainer for other debts, independent of any such consent, and that it is a just right, resulting to the pledgee by mere operation of law, whenever no stipulation exists to the contrary.[5] And he states the French law to concur with the Roman law in all such cases, where the claim is certain, and does not sound merely in unliquidated damages.[6] By the Scottish law, if the precise limits of the security, and the special appropriation to a particular debt, are not established by the clearest evidence, the pledge will be deemed an effectual security for all debts.[7]

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[1] Cod. Lib. 8, tit. 27; Pothier, de Nantissement, n. 47.

[2] Pothier, de Nantissement, n. 47; 2 Story on Eq. Jurisp. § 1034, 1035.

[3] Dig. Lib. 13, tit. 7, l. 11, § 3; 2 Kent, Comm. Lect. 40, p. 584, 4th edit.

[4] Jarvis *v.* Rogers, 15 Mass. R. 389, 397, 407, 415; Cod. Lib. 8, tit. 27; Wood, Civ. Law, 222; 2 Kent, Comm. Lect. 40, p. 584, 4th edit.; 2 Story on Eq. Jurisp. § 1010 and note.

[5] Pothier, de Nantissement, n. 47; Code Civil of France, art. 2082.

[6] Pothier, de Nantissement, n. 47.

[7] 1 Bell, Comm. § 607, 4th edit.; 2 Bell, Comm. § 702, 4th edit.; 2 Bell,

§ 306. The pledge applies, not only to the debt or other engagement, but also to the interest, and all the incidental charges and expenses due thereon. If, for instance, a pledge is for a debt, it covers the interest upon the debt. If interest is expressly stipulated for, it follows from the presumed intention of the parties, that the pledge is to cover both principal and interest. If interest is not stipulated for, and yet is due *ex morâ*, because of the unjust delay of the pledgor, to pay the debt when he ought, that also in equity is required to be paid, as well as the principal, before a redemption of the pledge is allowed;[1] for here the rule of the Roman law justly applies: *Minus solvit, qui tardius solvit; nam et tempore minus solvitur.*[2]

§ 306 *a*. In regard to the expenses which have been incurred by the pledgee about the pledge, we are to consider whether they are necessary and proper for its protection and preservation, or are merely useful. If the former, then the pledgor is bound to reimburse them to the pledgee; if the latter, then he is not bound to reimburse them, unless incurred by his own expressed or implied authority.[3] In the Roman and foreign law, the pledgee will, however, be entitled to reimbursement for them, if they were moderate, and it should be deemed equitable by the proper judge to allow them.[4] Even if the pledge should perish, the pledgee will be entitled to be repaid his necessary expenses.[5] By the law of Louisiana, the debtor is bound to pay to the creditor all the useful and necessary expenses, which the latter has made for the preservation of the pledge.[6] The French Code is to the same effect.[7]

Comm. p. 684, 5th edit.; 2 Bell, Comm. p. 22, 5th edit.; Bell, Illustr. of Law of Scotland, § 1364, ed. 1838; Cod. Lib. 8, tit. 14, l, 6.

[1] Pothier, Pand. Lib. 13, tit. 7, n. 5, and note (2), Ibid.; Dig. Lib. 13, tit. 7, l. 11, § 3.

[2] Pothier, Traité de l'Usure, n. 117; Dig. Lib. 50, tit. 16, l. 12, § 1.

[3] Post, § 357, 358.

[4] 1 Domat, B. 3, tit. 1, § 3, art. 4, 19, 20; Dig. Lib. 13, tit. 7, l. 8, § 5; Id. l. 25; Dig. Lib. 20, tit. 4, l. 18; Ayliffe, Pand. B. 4, tit. 18, p. 531, 532, 537; 1 Dane, Abridg. ch. 17, art. 4; 2 Kent, Comm. Lect. 40, p. 583, 4th edit.; Pothier, de Nantissement, n. 60, 61; Post, § 358.

[5] Pothier, de Nantissement, n. 60, 61; Dig. Lib. 13, tit. 7, l. 8.

[6] Code of Louisiana of 1825, art. 3139.

[7] Code Civil of France, art. 2080.

§ 307. In the Roman law, it should seem that the pledgee has not any property in the thing; but he has a mere right of retention or detainer. *Pignus, manente proprietate debitoris, solam possessionem transfert ad creditorem;*[1] or, as we should say, the pawnee has a mere lien, and no property. Strictly speaking, at the common law, a mere lien may be constituted without either a *jus in re* or a *jus ad rem*,[2] although for the most part it is accompanied by a special property. In the law of Scotland, a pledge confers what is called a real right (that is, a right in the thing),[3] but it is not attended with any other effect, than the power to retain the pledge, and to apply to the proper judicial authority for a warrant to have it sold for the debt or other engagement.[4] This also seems to be the law of France, as well as of other continental nations.[5]

§ 308. Another right resulting, by the common law, from the contract of pledge, is the right to sell the pledge, when there has been a default in the pledgor in complying with his engagement.[6] Such a right does not devest the general property of the pawnor, but still leaves in him (as we shall presently see), a right of redemption.[7] But if the pledge is not redeemed within the stipulated time, by a due performance of the contract for which it is a security, the pawnee has then a right to require a sale to be made thereof, in order to have his debt or indemnity.[8] If there is no stipulated time for the payment of the debt, but the pledge is for an indefinite period, the pawnee has a right, upon request, to insist upon a prompt fulfilment of the engagement; and if the pawnor neglects or refuses to comply, the pawnee may, upon due demand and notice to the pawnor, require the pawn to be sold.[9]

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[1] Dig. Lib. 13, tit. 7, l. 35, § 1; Pothier, Pand. Lib. 20, tit. 1, n. 26; Pothier, de Nantissement, n. 22; Code of Louisiana of 1825, art. 3133.

[2] Brace *v.* Duchess of Marlborough, 2 P. Williams, 491.

[3] 1 Bell, Comm. § 200, 4th edit.; 1 Bell, Comm. p. 210, 258, 5th edit.

[4] 2 Bell, Comm. § 701, 4th edit.; Id. 20–22, 5th edit.

[5] Pothier, de Nantissement, n. 22.

[6] 2 Kent, Comm. Lect. 40, p. 581, 582, 4th edit.; Post, § 310.

[7] Post, § 310.

[8] 2 Kent, Comm. Lect. 40, p. 581, 582, 4th edit.; Post, § 310.

[9] 2 Kent, Comm. Lect. 40, p. 581, 582, 4th edit.; Post, § 310; 2 Story on

§ 309. By the Roman law a right of sale was given, to the same effect as in the common law.[1] If a right to sell constituted a part of the contract, it was, of course, obligatory. If no such right was provided for in the contract, and a sale was not prohibited, it might be made; and even if prohibited, the pledgee might, after regular notice and proceedings against the pledgor, have a right to sell upon his default of payment.[2] The sale might be by a judicial order of sale, or by the act of the party, after due notice to the owner; and in either case, if the sale was *bonâ fide*, it passed the title completely to the purchaser.[3] Justinian, however, directed, that if any mode of selling was prescribed by the parties, that should be followed; and that, in the absence of any such stipulation, the pawnee might sell, after two years from the proper notice to the party, or from a judicial sentence, and not before.[4] The modern nations of Continental Europe, and others using the civil law, seem generally to have adopted the rule of requiring a judicial sale.[5] The Code of Louisiana has adopted the like rule.[6]

§ 310. The common law of England existing in the time of Glanville seems to have required a judicial process to justify the sale, or at least to destroy the right of redemption.[7] But the law as at present established leaves an election to the

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Eq. Jurisp. § 1031 to 1033; Brownell *v.* Hawkins, 4 Barbour, Supreme Ct. (N. Y.), R. 491; Wilson *v.* Little, 2 Comstock (N. Y.), R. 443.

[1] Pothier, Pand. Lib. 20, tit. 5, n. 1–3, 18, 19.

[2] Pothier, Pand. Lib. 20, tit. 5, n. 1–3, 18, 19; 1 Domat, B. 3, tit. 1, § 3, art. 10; Ayliffe, Pand. B. 4, tit. 18, p. 533.

[3] 2 Story on Eq. Jurisp. § 1008, 1009.

[4] Pothier, Pand. Lib. 20, tit. 4, n. 18, 19; Cod. Lib. 8, tit. 34, l. 3, § 1; Heinecc. Pand. P. 4, Lib. 20, tit. 5, § 37, 38, 39, 42; 1 Domat, B. 3, tit. 1, § 3, art. 9, 10; Ayliffe, Pand. B. 4, tit. 18, p. 532.

[5] Pothier, de Nantissement, n. 24, 25; Code Civil of France, art. 2078; Code of Louisiana of 1825, art. 3132; Ersk. Inst. B. 3, tit. 1, § 33; 2 Kent, Comm. Lect. 40, p. 581, 582, 4th edit.; 1 Domat, B. 3, tit. 1, § 3, art. 1, 2; Ersk. Inst. B. 3, tit. 1, § 33; 2 Bell, Comm. § 701, 4th edit.; Id. p. 20, 21, 22, 5th edit.

[6] Code of Louisiana of 1825, art. 31, 32; Rasch *v.* His Creditors, 1 Louisiana Ann. Rep. 31.

[7] Glanville, Lib. 10, ch. 1, 6; 1 Reeves's Hist. of Law, 161, 162; 2 Bell, Comm. § 701, 4th edit.; Id. p. 20–22, 5th edit.; Post, § 346.

pawnee. He may file a bill in equity against the pawnor for a foreclosure and sale; or he may proceed to sell *ex mero motu*, upon giving due notice of his intention to the pledgor.[1] In the latter case, if the sale is *bonâ fide* and reasonably made, it will be equally as obligatory as in the first case.[2] [The sale should be at public auction;[3] and evidence of a local custom to sell at a private sale is inadmissible, as being contrary to law.[4] The pawnee cannot become the purchaser, although the sale be public. He will still hold the property merely as collateral.[5]] But a judicial sale is most advisable in cases of pledges of large value; as the Courts watch any other sale with uncommon jealousy and vigilance; and any irregularity may bring its validity into question.[6] With the exception of Louisiana, where the civil law prevails, the English rule seems generally adopted in America.[7]

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[1] Kemp *v.* Westbrook, 1 Ves. 278; Cortelyou *v.* Lansing, 2 Cain. Cas. in Err. 200, 202; Garlick *v.* James, 12 Johns. R. 146; Vaupell *v.* Woodward, 2 Sandf. Ch. R. 143; Wilson *v.* Little, 1 Sandf. Sup. Ct. (N. Y.), R. 351; Patchin *v.* Pierce, 12 Wend. R. 61; Hart *v.* Ten Eyck, 2 Johns. Ch. R. 62, 100; 2 Story on Eq. Jurisp. § 1030–1033. [In respect to notice of sale by the creditor, there is no difference between the case of a pledge for a debt payable immediately, and one where the debt does not become payable until a future day; although in the latter case it has been contended that notice was unnecessary. Stearns *v.* Marsh, 4 Denio, R. 227. See also, Wilson *v.* Little, 2 Comstock (N. Y.), R. 443.]

[2] Pothonier *v.* Dawson, 1 Holt, N. P. R. 385; 2 Bell, Comm. § 703, 4th edit.; 2 Bell, Comm. 20, 22, 5th edit.; 2 Story on Eq. Jurisp. § 1032, 1033; Tucker *v.* Wilson, 1 P. Wms. 261; s. c. 1 Bro. Parl. Cas. 494; s. c. 5 Bro. Parl. Cas. 193, Tomlins's edit.; Lockwood *v.* Ewer, 9 Mod. 278; s. c. 2 Atk. 303; Cortelyou *v.* Lansing, 2 Cain. Err. 200; 2 Kent, Comm. Lect. 40, p. 581, 582, 4th edit.; Robinson *v.* Hurley, 11 Iowa, R. 410; Garlick *v.* James, 12 Johns. R. 146; Kemp *v.* Westbrook, 1 Ves. 278. There does not seem to be any distinction, as to the right to sell, between the case of a pledge and that of a mortgage of chattels. Ibid.; 2 Story on Eq. Jurisp. § 1030 to 1035; Hart *v.* Ten Eyck, 2 Johns. Ch. R. 62, 100; Patchin *v.* Pierce, 12 Wend. R. 61.

[3] Rankin *v.* McCullough, 12 Barbour, 103; Wheeler *v.* Newbould, 16 N. Y. R. 392; Dyckers *v.* Allen, 7 Hill, 497.

[4] Wheeler *v.* Newbould, 16 N. Y. R. 392.

[5] Middlesex Bank *v.* Minot, 4 Met. 325.

[6] 2 Kent, Comm. Lect. 40, p. 581, 582, 4th edit.; Demandray *v.* Metcalf, Prec. Ch. 419; s. c. Gilb. Eq. R. 104; Kemp *v.* Westbrook, 1 Ves. 278; Vanderzee *v.* Willis, 3 Bro. Ch. R. 21; Hart *v.* Ten Eyck, 2 Johns. Ch. R. 62, 100.

[7] 2 Kent, Comm. Lect. 40, p. 581, 582, 4th edit.; Cortelyou *v.* Lansing, 2

§ 311. The case of pawns seems in this respect distinguishable from the ordinary case of liens; for a mere right of lien is not understood to carry with it any general right of sale to secure an indemnity. The foundation of the distinction rests in this, that the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation;[1] but in the case of a lien, nothing is supposed to be given but a right of retention or detainer, unless under special circumstances.[2]

Cain, Err. 200; McLean *v.* Walker, 10 Johns. R. 471; Garlick *v.* James, 12 Johns. R. 146; Hart *v.* Ten Eyck, 2 Johns. Ch. R. 62.

[1] Gibbs, C. J., in Pothonier *v.* Dawson, 1 Holt's N. P. R. 386.

[2] 2 Bell, Comm. § 701, 773, 4th edit.; 2 Bell, Comm. p. 20–22; Id. p. 95, 96, 5th edit.; Story on Agency, § 371; Pothonier *v.* Dawson, Holt's Rep. 385; [Doane *v.* Russell, 3 Gray, 382. Shaw, C. J., there said: "In the case of Pothonier *v.* Dawson, Holt, N. P. 383, before Chief Justice Gibbs, he says: 'Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods. But when goods are deposited, by way of security, to indemnify a party against a loan of money, it is more than a pledge.' He places it on the ground of an implied authority, arising from the nature of the transaction, that the pledgee, after due notice, shall have the power to sell the goods and reimburse himself. The latter point has been held in this and other American states. Parker *v.* Branker, 22 Pick. 40; Hart *v.* Ten Eyck, 2 Johns. ch. 100. The case in Holt, in which it was laid down as the general rule that a lien gives no right of sale, was a *nisi prius* case; but it was stated, by a very eminent judge, as a rule well established, and has been cited with approbation since. In Jones *v.* Pearle, 1 Stra. 557, it was held that, except by the custom of London, an innkeeper had no right to sell horses on which he had a lien for their keeping. So it is stated by Mr. Justice Buller, in his celebrated judgment in Lickbarrow *v.* Mason, reported in a note to 6 East, 21. Having described a lien to be a qualified right which, in given cases, may be exercised over the property of another, and illustrating the distinction between the owner of property, and one having a lien on it, he says, that the former may sell or dispose of the goods as he pleases; 'but he who has a lien only on goods has no right so to do; he can only retain them till the original price be paid.' This is no judicial decision; but it is a statement of what the law was understood to be by a judge of great authority, and stated as a point so clearly settled and understood that it was used by way of illustration of a principle less clear. But even in case of a pledge, as security for a debt, the property is not devested; the general property remains in the pledgor; it is a lien with a power of sale superadded; but, till the rightful execution of the power, the general property is not devested. Walter *v.* Smith, 5 B. & Ald. 439. These general doctrines are well

§ 312. But it may be asked what are the rights of the pledgee when the pledge is sold, and there are various claims upon the fund produced by the sale? This subject is treated at large in the Roman law; and a few of the leading distinctions will be here averted to.[1] In the first place, those creditors who have what are called privileged debts in the Roman law, that is to say, debts in respect to which a lien or right of preference exists on the property, enjoy a priority of payment, and are to be paid before the pawnee; and privileged creditors of equal rank and degree are to take *pari passu.* In the next place, those creditors who, as mortgagees or pawnees, have a specific title to the thing, take according to the priority in point of time of their respective titles, unless some peculiar circumstances intervene to vary the rule. *Qui prior est tempore potior est jure.*[2] In the next place, if the pledge is for the joint benefit of several creditors, each of them is entitled to share equally with the others according to his debt. But if the thing is pledged severally to two creditors, without any communication with each other, and one of them has obtained the possession, he is entitled to a preference, according to the maxims, *In pari causâ possessor potior haberi debet;*[3] *In æquali jure melior est conditio possidentis.* In the case of a sale of a pledge, these rules are constantly observed in the distribution of the fund; so that every creditor who possesses a

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stated, and the authorities reviewed in Cortelyou *v.* Lansing, 2 Caines' Cas. 200. We think the rule is generally stated by the text writers, that a party having a lien only, without a power of sale superadded by agreement, cannot lawfully sell the chattel for his reimbursement. It is so stated in 1 Chit. Gen. Pract. 492; and he advises carriers and others, entitled to a lien, to obtain an express stipulation for power of sale in case the lien is not satisfied. 2 Kent, Comm. (6th ed.), 642; Cross on Lien, 47; Woolrych on Com. and Merc. Law, 237. The language of the learned American commentator, in summing up his article on lien, is this: 'I will conclude with observing that a lien is, in many cases, like a distress at common law, and gives the party detaining the chattel the right to hold it as a pledge or security for the debt, but not to sell it.'"]

[1] See 1 Domat, B. 3, tit. 1, § 5, per tot.; Pothier, de Nantissement, n. 26; Pothier, Pand. Lib. 20, tit. 4, per tot.

[2] Pothier, Pand. Lib. 20, tit. 4, § 1.

[3] Dig. Lib. 50, tit. 17, l. 128.

superior right or privilege will be entitled to maintain it, and to receive a full compensation from the fund, before the creditor who holds under a mere contract of pledge from the debtor.[1] In the next place, if the thing is pledged to one and the same creditor for several debts, and the pledge, when sold, is not sufficient to pay all the debts, the money arising from the sale is to be applied proportionally to all the debts, to extinguish the same *pro tanto*.[2]

§ 313. Few cases have arisen upon this subject in the common law; and it would be unsafe to rely wholly upon the civil law, as furnishing safe analogies for our guidance. In the absence, however, of any authority, the civilians may assist our inquiries; and for this purpose, Domat, in an especial manner, may be consulted with advantage.[3] It has been decided, that a person who held a mortgage as security for a debt due to himself, and for another debt due to a third person, and who had agreed to sell the property whenever he could realize a sum equal to both debts, and to apply the proceeds to the payment of the debt of the third person, was entitled, if the proceeds were insufficient to satisfy both debts, to satisfy his own debt first, and to apply the surplus only to the other debt.[4] The case seems to have turned upon the construction of the peculiar language of the agreement in that case. But the Court said, that, as there was no stipulated appropriation in case the proceeds should fall short of both debts, the party holding the pledge was entitled to satisfy his own demand first, and to pay over the surplus only to the other party. This seems to follow out the rule of the Roman law, which, in a like case,

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[1] 1 Domat, B. 3, tit. 1, § 5, per tot.; 1 Domat, B. 3. tit. 1, § 1, art. 13, 14; Id. § 3, art. 3; Heinec. Pand. P. 4, Lib. 20, tit. 4, § 31 to 36; Ayliffe, Pand. B. 4, tit. 18, p. 529; Pothier, Pand. Lib. 20, tit. 4, per tot.

[2] Herkimer Manuf. & Hyd. Co. *v.* Small, 21 Wend. R. 273; Blackstone Bank *v.* Hill, 10 Pick. R. 129, 131; Domat, B. 4, tit. 1, § 4, art. 7; Id. B. 3, tit. 1, § 3, art. 15.

[3] Pothier, de Nantissement, n. 26; Heinecc. Pand. 4, Lib. 20, tit. 4, § 36; Dig. Lib. 20, tit. 1, l. 10; Ayliffe, Pand. B. 4, tit. 18, p. 524; 1 Domat, B. 3, tit. 1, § 1, art. 14; Wood, Civ. Law, 221; 1 Domat, B. 3, tit. 1, § 5, per tot.; Pothier, Pand. Lib. 20, tit. 4, per tot.

[4] Marshall *v.* Bryant, 12 Mass. R. 321.

considers the possession as entitling the party to a preference.[1] *In pari causâ possessor potior haberi debet.*[2]

§ 314. If several things are pledged, each is deemed liable for the whole debt or other engagement.[3] And the pledgee may proceed to sell them from time to time, until the debt or other claim is completely discharged.[4] If one thing perishes by accident or casualty without his default, he has a right over all the residue for his whole debt or other duty.[5] The pledgee may also sell, not only the things pledged, but all their increments.[6] But when once he has obtained an entire satisfaction, he can proceed no further; and if there is any surplus, it belongs to the pledgor.[7] If the things pledged are insufficient to pay the whole debt or other duty, the surplus constitutes a personal charge on the debtor, or other contracting party, and may be recovered accordingly.[8] And the pledgee may release one of the things pawned without affecting any of his rights over the others.[9]

§ 315. The possession of the pawn does not suspend the right of the pawnee to proceed personally against the pawnor for his whole debt or other engagement, without selling the pawn [although the pawn has by the delay become worthless],[10] for it is only a collateral security.[11] [And he may attach the

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[1] 1 Domat, B. 3, tit. 1, § 1, art. 14; Dig. Lib. 20, tit. 1, l. 10; Dig. Lib. 50; tit. 17, l. 128; Pothier, Pand. Lib. 20, tit. 4, § 20, 31.

[2] Dig. Lib. 50, tit. 17, l. 128; Ante, § 312.

[3] Pothier, de Nantissement, n. 43, 44, 46; Code Civil of France, art. 2082, 2083; Code of Louisiana, art. 3130, 3131.

[4] Ibid.

[5] 1 Domat, B. 3, tit. 1, § 1, art. 18, § 3, n. 12; Ratcliff *v.* Davis, Yelv. 178; Bac. Abridg. *Bailment*, B.; Anon. 2 Salk. R. 522; Pothier, de Nantissement, n. 43.

[6] Code of Louisiana, art. 3135.

[7] 1 Domat, B. 3, tit. 1, § 1, art. 29, § 3, art. 12; Bac. Abridg. *Bailment*, B.; Stevens *v.* Bell, 6 Mass. R. 339.

[8] 1 Domat, B. 3, tit. 1, § 1, art. 31; Tooke *v.* Hartley, 2 Brown, Ch. R. 125; South Sea Company *v.* Duncomb, 2 Str. 919.

[9] 1 Domat, B. 3, tit. 1, § 3, art. 13, 14.

[10] Granite Bank *v.* Richardson, 7 Met. 407; Word *v.* Morgan, 5 Sneed, 79.

[11] South Sea Company *v.* Duncomb, 2 Str. 919; Bac. Abridg. *Bailment*, B.; Anon., 12 Mod. 564; 1 Dane, Abridg. ch. 18, art. 4, § 9. See Post, § 366; Elder *v.* Rouse, 15 Wend. R. 218; Langdon *v.* Buel, 9 Wend. R. 80,

very property pledged to secure the debt.[1]] If the pawnor, in consequence of any default or conversion of the pawnee, has, by an action, recovered the value of the pawn, still the debt remains, and is recoverable, unless in such prior action it has been deducted.[2] It seems, that by the common law the pawnee, in such an action brought for the tort, has a right to have the amount of his debt recouped in the damages.[3]

§ 316. By the Roman law the pawnee could not be forced to commence a personal suit against the debtor; but he might rely upon the security of his pledge. *Creditor ad petitionem debiti urgeri jure minime potest.*[4] Nor did it make any difference in this respect that the pawnee had omitted to sell the pledge. The language of the Code is, *Persecutione pignoris omissa, debitores actione personali convenire creditor urgeri non potest.*[5] The common law has adopted the same doctrine.

§ 317. In speaking of sales by the pledgee, it has been assumed, that there is no special agreement between the parties, as to the time or mode of sale, nor any stipulation wholly interdicting any sale. If any such agreement exists, it must ordinarily regulate the rights of both parties; and neither of them will be allowed to depart from it with impunity.[6] Even where there was an express prohibition of sale in the terms of the contract, the Roman law (as we have seen[7]) authorized the pledgee to demand his debt, and, upon the pledgor's refusal to pay it, enabled him to obtain a judicial decree for a sale; for it was said, that otherwise the pledge might be useless.[8] The common law does not appear to have made any direct provision

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83; Case *v.* Boughton, 11 Wend. R. 106; Cleverly *v.* Brackett, 8 Mass. R. 150; Beckwith *v.* Sibley, 11 Pick. R. 482, 484; Townsend *v.* Newell, 14 Pick. R. 332; Whitaker *v.* Sumner, 20 Pick. R. 399, 406.

[1] Buck *v.* Ingersoll, 11 Met. 226; Arendale *v.* Morgan, 5 Sneed, 704.

[2] Ratcliff *v.* Davis, Yelv. 179; Bac. Abridg. *Bailment*, B.

[3] Jarvis *v.* Rogers, 15 Mass. R. 389. See Ward *v.* Fellers, 3 Mich. 288.

[4] Cod. Lib. 8, tit. 14, l. 20.

[5] Pothier, Pand. Lib. 20, tit. 6, § 2, l. 6; Cod. Lib. 8, tit. 14, l. 24.

[6] Stevens *v.* Bell, 6 Mass. R. 339.

[7] Ante, § 309.

[8] 1 Domat, B. 3, tit. 1, § 3, art. 10; Ayliffe, Pand. B. 4, tit. 18, p. 533; Pothier, Pand. Lib. 20, tit. 5, n. 1, 2.

in such a case. How far a court of equity might interfere to grant redress, it is not perhaps easy to say, especially if the pledge should be perishable.[1]

§ 318. But the right of the pledgee is strictly confined to a sale; for he cannot appropriate the property to himself upon the default of the pledgor; nor can he so appropriate it (as we shall hereafter see) by any agreement with the pledgor, that upon such default it shall be irredeemable; for such an engagement is repudiated by the common law and the Roman law, as unconscionable and against public policy.[2]

§ 319. In respect to sales, also, there is this salutary restraint upon the pawnee to secure his fidelity and good faith, that he can never become a purchaser at the sale.[3] This rule will be found recognized equally in the common law and the Roman law.[4] Indeed, it is founded upon a principle still more broadly enforced in equity jurisprudence, that where a fiduciary relation exists between parties, the agent shall never be permitted to obtain a personal benefit to himself, by any act done or purchase made, which may prejudice the right or interests of his principal, or may involve him in a conflict of duties and interests.[5]

§ 320. Where there is no contract on the part of the pledgee requiring him to sell the pledge, it has been said, that at the common law he is not compellable so to do; but he may retain the pledge, until the discharge of his debt or other contract. This doctrine is true with reference to the case in which it was used; for the point there was, whether another creditor, by a foreign attachment or execution could compel the pledgee to sell; and it was very properly held that he could not.[6] But a court of equity might, in a fit case, inter-

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[1] See 2 Story on Eq. Jurisp. § 1030 to 1036.

[2] 1 Domat, B. 3, tit. 1, § 3, art. 11; Post, § 345; Pothier, de Nantissement, n. 18; 2 Story on Eq. Jurisp. § 1008, 1009, 1019, 1031; Garlick *v.* James, 12 Johns. R. 146.

[3] Middlesex Bank *v.* Minot, 4 Metc. 325.

[4] Ayliffe, Pand. B. 4, tit. 18, p. 534; Cod. Lib. 8, tit. 28, l. 10.

[5] 1 Story on Eq. Jurisp. § 308 to 323.

[6] Badlam *v.* Tucker, 1 Pick. 389, 400.

fere in favor of the pledgor, and compel a sale, if it was clear that the property would produce more than sufficient to satisfy the debt, or if it was of a perishable nature.[1] The Roman law authorized the pledgor to insist upon a compulsive sale against the pledgee in many cases, if not universally, although it is admitted that it might be dealing out to the latter a hard measure of justice. *Invitum enim creditorem cogi vendere, satis inhumanum est.*[2] The law of Louisiana has recognized the same right.[3]

§ 321. Where the pledge is a negotiable security (such as a negotiable note), the pledgee has a right to recover and receive the money due thereon, and to sue for it in his own name. But he has no right (unless perhaps in a very extreme case) to compromise with the parties to the security for a less sum than the sum due on the security; and if he does, he will be compelled to account to the pledgor for the full value.[4] [And it has been held that a pledgee of such paper has no right, in the absence of a special power, to sell the pledge, but is bound to collect it and apply the proceeds to his own debt.[5]]

§ 322. In the next place, as to the right of the pledgee to alienate the property. It is very certain, that, at the common law, he cannot alienate the property absolutely, nor beyond the title actually possessed by him, unless in special cases.[6] But if the pledge is of mere current coin, or of a negotiable security, capable in its own nature of passing by delivery, there, if the pledgee sells it to a *bonâ fide* purchaser without notice, the latter acquires an absolute property in the pledge.[7] For, in a

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[1] See 2 Story on Eq. Jurisp. § 1031, 1032, 1033; Kemp *v.* Westbrook, 1 Ves. R. 278.

[2] Pothier, Pand. Lib. 20, tit. 5, n. 16; Dig. Lib. 13, tit. 7, l. 6.

[3] Williams *v.* Schr. St. Stephens, 14 Martin, R. 24.

[4] Bowman *v.* Wood, 15 Mass. R. 534; Garlick *v.* James, 12 Johns. R. 146; Depuy *v.* Clark, 12 Ind. R. 432.

[5] Wheeler *v.* Newbould, 16 N. H. R. 392.

[6] Demandray *v.* Metcalf, 2 Vern. 691; s. c. 1 Eq. Cas. Abr. 324; s. c. Free. Ch. 419; Hartop *v.* Hoare, 3 Atk. 44; Pickering *v.* Busk, 15 East, R. 38; Ayliffe, Pand. B. 4, tit. 18, p. 534. See Bailey *v.* Colby, 34 N. H. R. 29.

[7] Ayliffe, Pand. B. 4, tit. 18, p. 534; Cod. Lib. 8, tit. 30, l. 1; 1 Story on Eq. Jurisp. § 434, 435; Story on Agency, § 126, 127, 128, 129, 130.

concurrence of equal rights, he who has trusted the party, and enabled him to impose upon another, shall be bound by his acts. Thus, if the pledge is of a certificate of stock, which may pass by delivery, a *bonâ fide* purchaser, or subsequent pledgee, may hold the stock against the real owner.[1]

§ 323. The like rule applies to negotiable securities.[2] But if a negotiable note, or other security, contains on it any intimation that it belongs to another person, or that it is for his use or account, there, it is incapable of being pledged for the use of the holder.[3] And the rule, in respect to negotiable securities, seems confined to cases of securities which pass as money. For although a bill of lading of goods is negotiable, yet if the consignee has a mere lien for advances, he cannot pledge them by indorsing the bill of lading (although he may sell them), even if the pawnee is ignorant that he is not the owner; unless, indeed, the owner should have enabled him so to act, by holding him out to the world as exclusively owner; for then he might be bound by the pledge.[4]

§ 324. The pawnee may, by the common law, deliver over the pawn into the hands of a stranger for safe custody without consideration;[5] or he may sell or assign all his interest in the pawn;[6] or he may convey the same interest conditionally by way of pawn to another person; without in either case de-

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[1] Jarvis *v.* Rogers, 13 Mass. R. 105; s. c. 15 Mass. R. 389.

[2] Bowman *v.* Wood, 15 Mass. R. 534; Garlick *v.* James, 12 Johns. R. 146; Depuy *v.* Clark, 12 Ind. R. 432; Collins *v.* Martin, 1 Bos. & Pull. 648; Peacock *v.* Rhodes, 2 Doug. R. 633; Hartop *v.* Hoare, 3 Atk. 50; Miller *v.* Race, 1 Burr. 452; Ante, § 296; 1 Bell, Comm. § 412, 4th edit.; 1 Bell, Comm. p. 486, 487, 5th edit.

[3] Treuttel *v.* Barandon, 8 Taunt. R. 100; Sigourney *v.* Lloyd, 8 Barn. & Cressw. 622; s. c. 5 Bing. R. 525.

[4] Newsom *v.* Thornton, 6 East, R. 17; Martini *v.* Coles, 1 M. & Selw. 140; Shipley *v.* Kymer, 1 M. & Selw. 484; Pickering *v.* Busk, 15 East, R. 38; Queiroz *v.* Trueman, 3 B. & Cressw. 342; Ante, § 296; Post, § 325 to 328; Story on Agency, § 93, 225; See 1 Bell, Comm. § 412, 4th edit.; 1 Bell, Comm. p. 483 to 488, 5th edit.

[5] Ingersoll *v.* Van Bokkelin, 7 Cowen, R. 670.

[6] Whitaker *v.* Sumner, 20 Pick. 399, 405, 406; Per Jackson, J., in Jarvis *v.* Rogers, 15 Mass. R. 408; Macomber *v.* Parker, 14 Pick. R. 497; Hunt *v.* Holton, 13 Pick. R. 216; Post, § 327, 350.

stroying or invalidating his security.[1] But if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof to his own creditor, as if he were the absolute owner; it is clear that in such a case he would be guilty of a breach of trust; and his creditor would acquire no title beyond that held by the pawnee.[2] The only question which, under such circumstances, would seem to admit of controversy, is, whether the creditor should be entitled to retain the pledge until the original debt was discharged, or whether the owner might recover the pledge in the same manner as if the case was a naked tort, without any qualified right in the first pawnee.

§ 325. The doctrine of the common law now established in England, after some diversity of opinion, is, that a factor having a lien on goods for advances, or for a general balance, has no right to pledge the goods; and if he does pledge them, he conveys no title to the pledgee.[3] The effect of this doctrine is, in England, to deny to the pledgee any right in such a case to retain the goods, even for the advances or balance due to the factor. In short, the transfer is deemed wholly tortious; so that the principal may sue for and recover the pledge, without making any allowance or deduction whatsoever for the debts due by him to the factor.[4] The inconvenience, not to say harshness, of the latter part of the doctrine has been very seriously felt in England. And what renders it somewhat objectionable in principle is, that it is admitted that the factor has a right to assign or deliver over the goods

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[1] Mores *v.* Conham, Owen, R. 123; Ratcliff *v.* Davis, 1 Buls. R. 29; s. c. Yelv. R. 178; Cro. Jac. 244; Jackson, J., in Jarvis *v.* Rogers, 15 Mass. R. 389, 408; Man *v.* Shiffner, 2 East, 523, 529; McCombie *v.* Davies, 7 East, 6, 7; Ante, § 296; Post, § 325 to 328, 350.

[2] See Ayliffe, Pand. B. 4, tit. 18, p. 534; Post, § 325, 326; Story on Agency, § 224.

[3] Daubigny *v.* Duval, 5 T. R. 604; Newsom *v.* Thornton, 6 East, R. 17; McCombie *v.* Davies, 7 East, R. 5; Martini *v.* Coles, 1 M. & Selw. 140; Shipley *v.* Kymer, 1 M. & Selw. 484; Solly *v.* Rathbone, 2 M. & Selw. 298; Pickering *v.* Busk, 15 East, R. 44; Queiroz *v.* Trueman, 3 Barn. & Cressw. 342; Story on Agency, § 113, and note; Id. § 225, 227.

[4] Story on Agency, § 113, and note, § 225, 227.

as a pledge or security to the extent of his lien thereon, if he avowedly confines the assignment or pledge to that, and does not exceed his own interest therein.[1] Now, if the right or lien of the factor is capable of assignment or transfer at all, as an interest or right adhering to the goods, and entitled to accompany the possession, there seems great difficulty in maintaining, that, because the title to the pledge is infirm in part, upon a general transfer or a general pledge, it shall be bad *in toto*, notwithstanding the pledgee may be an innocent *bonâ fide* holder. The general denial of the right of factors to pledge does not appear to have approved itself to the minds of Lord Eldon and Lord Ellenborough;[2] and it has been suggested by Mr. Bell, that it probably had its origin in mistake.[3] Parliament, however, has at length interfered, and has by statute placed the doctrine on this subject upon a far more rational foundation than it was placed by the decisions of Westminster Hall.[4]

§ 326. In America, the general doctrine, that a factor cannot pledge the goods of his principal, has been frequently recognized.[5] But it does not appear, as yet, to have been carried to the extent of deeming the pledge altogether a tortious proceeding, so that the title is not good in the pledgee, even to the extent of the lien of the factor; or, so that the principal may maintain an action against the pledgee without discharging the lien, or at least without giving the pledgee a right to re-

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[1] Man *v.* Shiffner, 2 East, R. 523, 529; McCombie *v.* Davies, 7 East, R. 6, 7; Kuckein *v.* Wilson, 4 Barn. & Ald. 443; 1 Bell, Comm. 483, 5th edit.; 2 Bell, Comm. 95, 5th edit.; Urquhart *v.* McIver, 4 Johns. R. 103; 2 Kent, Comm. Lect. 41, p. 625 to 628, 4th edit.; Story on Agency, § 113, and note; Id. § 225, 227.

[2] Pulteney *v.* Keymer, 3 Esp. R. 182; Pickering *v.* Busk, 15 East, R. 44.

[3] 1 Bell, Comm. § 412, 4th edit.; 1 Bell, Comm. p. 486, 5th edit.; 2 Kent, Comm. Lect. 41, p. 627, 628, note (a); Story on Agency, § 113, and note.

[4] 4 Geo. 4, ch. 94; 1 Bell, Comm. p. 486, 487, 5th edit.; Story on Agency, § 113, note; 2 Kent, Comm. Lect. 41, p. 627, 628, note (a).

[5] Kinder *v.* Shaw, 2 Mass. R. 398; Odiorne *v.* Maxy, 13 Mass. R. 178; 2 Kent, Comm. Lect. 41, p. 625 to 628, 4th edit.; Jarvis *v.* Rogers, 15 Mass. R. 389; Urquehart *v.* McIver, 4 Johns. R. 103; Van Amringe *v.* Peabody, 1 Mason, R. 440; Bott *v.* McCoy, 20 Ala. 578.

coup the amount of the lien in the damages. Considering the present state of the English law on this point, and the unsatisfactory principle on which the former doctrine rests, it would, perhaps, be matter of regret, if the American Courts should feel themselves constrained, by the pressure of authority, to yield to it.[1] [Later decisions have, however, fully settled the law that a pledge by a factor of his principal's goods is wholly tortious, and the owner may recover their whole value of the pledgee without any reduction or recoupment for his claim against the factor.[2]]

§ 327. But whatever doubt may be indulged as to the case of a mere factor, it has been decided, that, in case of a strict pledge, if the pledgee transfers the same to his own creditor, the latter may hold the pledge, until the debt of the original owner is discharged.[3] And it has been intimated, that there is, or may be, a distinction favorable to the pledgee, which does not apply, or may not apply, to a factor, since the latter has but a lien; whereas the former has a special property in the goods.[4] It is not very easy to point out any substantial distinction between the case of a pledgee and the case of a factor. The latter holds the goods of his principal, as a security and pledge for his advances and other dues. He has a special property in them, and may maintain an action for any violation of his possession, either by the principal or by a stranger.[5] And he is generally treated, in juridical discussions, as in the condition of a pledgee.[6] But whether the distinction is well or ill founded, it does not materially affect the reasoning, which assigns to the

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[1] 2 Kent, Comm. Lect. 41, p. 625 to 628, note (a), 4th edit.

[2] See Hoffman *v.* Noble, 6 Metc. 74; Warner *v.* Martin, 11 Howard, 209; Newbold *v.* Wright, 4 Rawle, 195; Holton *v.* Smith, 7 New Hamp. R. 446.

[3] Jarvis *v.* Rogers, 15 Mass. R. 389.

[4] Jarvis *v.* Rogers, 15 Mass. R. 408. See also, Homes *v.* Crane, 2 Pick. R. 610.

[5] Ante, § 303.

[6] McCombie *v.* Davies, 7 East, R. 5; Whitaker on Liens, 127; 2 Black. Comm. 395, 396; Jones on Bailm. 85, 86; 2 Kent, Comm. Lect. 41, p. 625 to 628, 4th edit.; 2 Saund. R. 47, note by Williams; 1 Bell, Comm. § 483, 5th edit.; 1 Bell, Comm. § 412, 4th edit.; Id. § 773; Paley on Agency, by Gow, ch. 5, 6, p. 282 to 288; Id. by Lloyd, p. 218–233, 341, 342.

pledgee of a factor a right to detain the pledge, until the lien of the factor is discharged. Where, instead of a mere pledge, there is an actual transfer of the goods by a deed or other legal conveyance by way of mortgage, there is no question, that the mortgagee may assign over the goods; and the assignee will be entitled to hold them against the mortgagor, until the mortgage debt, originally contracted, is paid. In such a case, a legal, although a defeasible title, is vested in the mortgagee, and not a mere lien;[1] and to the extent of that title his assignment is operative and valid, and cannot be disturbed by the mortgagor, even although the mortgagee shall have assumed to convey an absolute title.[2]

§ 328. Upon this subject the Roman law seems to have adopted the following rule. It enabled the pawnee to assign over, or to pledge the goods again, to the extent of his interest or lien on them; and, in either case, the assignee was entitled to hold the pawn, until the original owner discharged the debt for which it was pledged.[3] *Jure pignoris teneri non posse, nisi quæ obligantis in bonis fuerint; et per alium rem alienam invito domino pignori obligari non posse, certissimum est.*[4] But beyond this, the pledge was inoperative, and conveyed no title, according to the known maxim, *Nemo plus juris ad alium transferre potest, quam ipse haberet.*[5] A relaxation of the strict rule of the Roman law, founded upon the convenience of commerce, seems to have worked its way into the modern jurisprudence of Continental Europe; in which it is said to be a general rule, that possession constitutes a title, and that persons making advances of money upon movable goods are not required to inquire to whom the property belongs, and are fully protected

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[1] Ante, 287, 311.

[2] Ante, § 287. See Whitaker *v.* Sumner, 20 Pick. R. 405; Ferguson *v.* Union Furnace Company, 9 Wend. R. 345; Ante, § 325; Post, § 350.

[3] Cod. Lib. 8, tit. 24, l. 1; 1 Domat, B. 4, tit. 3, § 6, art. 1 to 7; Ayliffe, Pand. B. 4, tit. 18, p. 539.

[4] Cod. Lib. 8, tit. 16, l. 6; 1 Bell, Comm. § 412, 4th edit.; Id. p. 485, 5th edit.

[5] Dig. Lib. 50, tit. 17, l. 54; Cod. Lib. 8, tit. 16, l. 6; Pothier, de Nantissement, n. 27.

for the advances they make.[1] The rule, though expressed in such general terms, ought probably to be received with the qualification, that the possession is *bonâ fide*, and not by a tort, and that the pledgor has an apparently good title, or right of possession.[2] But, at all events, there seems no doubt, that by the law of Continental Europe, it is universally recognized, that factors have a right to pledge the goods intrusted to them, and may thereby bind the goods to the full extent of any advances made upon them, although they cannot for any antecedent debts due from the factor.[3] Mr. Bell, in his Commentaries, has given an interesting view of the origin, progress, and present state of the law of Scotland, as well as of the Continent of Europe, on this subject, which will reward a careful perusal.[4]

§ 329. Another point, usually discussed under this head, is, how far the pawnee is entitled to use the pawn. Much of what properly belongs to this subject has been already anticipated under other heads.[5] The true rules deducible from the common-law authorities, and founded upon the presumed intentions of the pawnor, seem to be the following. (1) If the pawn is of such a nature, that the due preservation of it requires some use, there such use is not only justifiable, but it is indispensable to the faithful discharge of the duty of the pawnee.[6] (2) If the pawn is of such a nature, that it will be

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[1] 1 Bell, Comm. p. 483 to 486, 5th edit.; 1 Bell, Comm. § 412, 4th edit.

[2] 1 Stair, Inst. B. 1, tit. 7, § 4; 1 Bell, Comm. § 412, 4th edit.; 1 Bell, Comm. § 483–487, 5th edit.; 2 Kent, Comm. Lect. 41, p. 527, 528, and note (a), 4th edit.

[3] 1 Bell, Comm. p. 483, 484 and note, 486, 5th edit.; 1 Bell, Comm. § 412, 4th edit. I have occasionally quoted both the 4th and the 5th editions of Mr. Bell's Commentaries. The fourth has the benefit of being subdivided into sections, and is best known in America. The fifth, published in 1826, is most valuable, as containing the learned author's last corrections. It is to be regretted, that he did not continue the subdivisions of sections in this last edition. See also, Code of Louisiana of 1825, art. 3123, 3214; 2 Kent, Comm. Lect. 41, p. 627, 628, note (a).

[4] 1 Bell, Comm. p. 483 to 488, 5th edit.; 1 Bell, Comm. § 412, 4th edit.

[5] Ante, § 89, 90.

[6] Jones on Bailm. 81.

worse for the use, such, for instance, as the wearing of clothes which are deposited, there the use is prohibited to the pawnee.[1] (3) If the pawn is of such a nature, that the keeping is a charge to the pawnee, as if it is a cow or a horse, there the pawnee may milk the cow and use the milk, and ride the horse by way of recompense (as it is said), for the keeping.[2] (4) If the use will be beneficial to the pawn, or it is indifferent, there it seems that the pawnee may use it; as, if the pawn is of a setting dog, it may well be presumed that the owner would consent to the dog's being used in partridge shooting, and thus confirmed in the habits which make him valuable.[3] So books, which will not be injured by a moderate use, may be read, examined, and used by the pawnee.[4]

§ 330. (5) If the use will be without any injury, and yet the pawn will thereby be exposed to extraordinary perils, there the use is impliedly interdicted. Sir William Jones, indeed, suggests, that in such a case the goods may be used (by which he is presumed to mean lawfully used), but it will be at the peril of the pledgee.[5] Thus, he says, that if chains of gold, ear-rings, bracelets, or other jewels, be left in pawn with a lady, and she wear them at a public place, and be robbed of them on her return, she must make them good.[6] In another work of

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[1] 2 Salk. R. 522; Coggs *v.* Bernard, 2 Ld. Raym. 909, 916; Jones on Bailm. 81; Mores *v.* Conham, Owen, R. 123, 124.

[2] 2 Salk. R. 522; Coggs *v.* Bernard, 2 Ld. Raym. 909, 917; Jones on Bailm. 81; 1 Dane, Abridg. ch. 17, art. 4, § 2. Mr. Chancellor Kent thinks the profits should belong to the pawnor, and be deducted from the debt. 2 Kent, Comm. Lect. 40, p. 578, 579, 4th edit.; Post, § 329, 331, 343. But in the case of Mores *v.* Conham (Owen, R. 123, 124), Lord Coke, and Warburton, and Daniel, Justices, held that the pawnee might take the milk and use it, as the owner would. The question has sometimes arisen as to the point whether, in case of a distress, the distrainer may milk a cow, &c. See Bagshaw *v.* Goward, Cro. Jac. 147; s. c. Noy, R. 119; Duncomb *v.* Reeve, Cro. Eliz. 783; Roll. Abridg. 673, l. 32; 9 Viner, Abridg. *Distress*, P. pl. 8; Comm. Dig. *Distress*, D. 6; Chamberlayne's case, 1 Leon. R. 220; Mores *v.* Conham, Owen, R. 123, 124; Bac. Abridg. *Distress*, D.; Gilbert on Distresses, by Hunt, 73, 74.

[3] Jones on Bailm. 81. See Thompson *v.* Patrick, 4 Watts, R. 414.

[4] Jones on Bailm. 81; Mores *v.* Conham, Owen, R. 123, 124.

[5] Jones on Bailm. 81.

[6] Ibid.

considerable authority, it is said, that if the goods pawned will be the worse for using, the pawnee must not use them; otherwise he may use them at his peril. Thus, if jewels are pawned to a lady, and she keep them in a bag, and they are stolen, she shall not be charged. But if she goes with them to a party, and they are stolen, she shall be answerable.[1] To the former position Sir William Jones objects, because, he says, the bag could hardly be taken privately and quietly, without her omission of ordinary diligence. And he considers himself well supported in this objection by the authorities.[2] This, however, will be a matter of discussion in a subsequent section. But it may well be doubted, whether there is any foundation for the doctrine, which is affirmed both by Mr. Justice Buller, and by Sir William Jones, that, in case of a deposit of things which are not hurt by use, the depositary may, at his peril, use them. The language of the authority, which is principally relied on for its support, does not, when properly construed, justify any such conclusion. In Coggs *v.* Bernard,[3] Lord Holt says: "If the pawn be such, as it will be worse for using, the pawnee cannot use it, as clothes, &c. But if it be such as will never be worse, as if jewels for the purpose were pawned to a lady, she might use them. But then she must do it at her own peril. For, whereas, if she keeps them locked up in her cabinet, if her cabinet is broken open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and, as such, is not liable to be used." Now, the reason here given, so far from proving that the pledgee may lawfully use the jewels, expressly negatives any such right. And, unless the contrary is expressly agreed, it may fairly be presumed, that the owner of such a pawn would not assent to the jewels being used as a personal ornament, and thereby be exposed to unnecessary and extraordinary perils.

§ 331. The Roman law and French law do not, in respect

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[1] Buller, Nisi Prius, 72.

[2] 2 Salk. R. 522; 2 Ld. Raym. 916, 917.

[3] 2 Ld. Raym. 909, 916.

to the right of using pawns, seem materially to differ from the common law, unless there is an exception furnished by the rule thereof, that, where the pawn is used (as if a cow is milked), and a profit is obtained thereby, the pawnee shall be bound to account for the profits, deducting all expenses for the keeping.[1] By the law of Louisiana, the fruits of the pledge are deemed to make a part of it, and the pledgee cannot appropriate them to his own use, but is bound to account for them.[2] Mr. Chancellor Kent seems to think that the rule in the common law is, or at least ought to be, the same.[3] And his doctrine certainly carries with it a most persuasive equity, although, as we have seen, it seems inconsistent with the rule laid down in some of the authorities.[4]

§ 332. Having considered the rights of the pawnee, the next inquiry is, as to his duties. And here the question naturally presents itself, what is the degree of diligence imposed upon the pawnee, in respect to the preservation of the pawn? As the bailment is for the mutual benefit and interest of both parties, the law requires, upon the principles already stated, that the pawnee should use ordinary diligence in the care of the pawn; and consequently he is liable for ordinary neglect in keeping the pawn.[5] This is the rule laid down by Bracton,[6] and maintained by Lord Holt.[7] This, too, seems, according to the better opinion, to be the rule of the Roman law.[8] The point of responsibility is in the Roman law stated to be, where

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[1] Jones on Bailm. 82; Pothier, Traité de Dépôt, n. 47; Pothier, de Nantissement, n. 23, 35, 36; 1 Domat, B. 3, tit. 1, § 4, art. 6; Dig. Lib. 20, tit. 1, l. 21, § 2; Pothier, Pand. Lib. 20, tit. 1, n. 26; Ante, § 330; Post, § 343; Code of Louisiana of 1825, art. 3135.

[2] Code of Louisiana of 1825, art. 3135.

[3] 2 Kent, Comm. Lect. 40, p. 578, 579, 4th edit.

[4] Ante, § 329, and note; Mores *v.* Conham, Owen, R. 123, 124.

[5] Jones on Bailm. 75; 2 Kent, Comm. Lect. 40, p. 578, 579, 4th edit.; 1 Dane, Abridg. ch. 17, art. 12; Commercial Bank of New Orleans, *v.* Martin, 1 Louisiana Ann. Rep. 344; Ante, § 23. See Goodall *v.* Richardson, 14 New Hamp. 567; Exeter Bank *v.* Gordon, 8 New Hamp. 66.

[6] Bracton, 99 b.

[7] Coggs *v.* Bernard, 2 Ld. Raym. 909, 916.

[8] Jones on Bailm. 15, 21, 23, 75; Heinecc. Pand. Lib. 13, tit. 6, § 117, 118; 1 Domat, B. 1, tit. 1, § 4, art. 1.

there is deceit and negligence of the pawnee. *Dolum et culpam, &c., pignori acceptum,*[1] is the language of one passage of the Digest. *Sed ubi utriusque utilitas vertitur, ut in empto, ut in locato, ut in dote, ut in pignore, ut in societate, et dolus et culpa præstatur,*[2] is that of another passage of the same great work. A third passage declares: *Ea igitur, quæ diligens paterfamilias in suis rebus præstare solet, a creditore exiguntur;*[3] and a fourth passage, *Quia pignus utriusque gratiâ datur, &c., placuit sufficere, si ad eam rem custodiendam exactam diligentiam adhibeat.*[4] The same rule of ordinary diligence is understood to be adopted in modern times in the principal countries of Continental Europe and in Scotland. It has the express sanction of Pothier, and other writers of acknowledged authority.[5]

§ 333. It is under the head of pawns, also (although it is often alluded to elsewhere), that Sir William Jones has principally discussed the question, how far theft (by which he means *private theft*, as contradistinguished from *robbery*) constitutes a valid excuse for bailees, who are responsible for ordinary diligence, and especially, how far it constitutes an excuse for pawnees.[6] We have already had occasion to notice this subject in our Introductory Chapter;[7] and to state that Sir William Jones holds, that theft is presumptive evidence of ordinary neglect, and of course, that pawnees are liable for losses by theft;[8] unless in cases where they can by positive evidence repel every presumption of such neglect.[9] In this view of the matter, he follows the supposed doctrine of the Roman law; and, indeed, it seems to have had an undue

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[1] Dig. Lib. 50, tit. 17, l. 23.

[2] Dig. Lib. 13, tit. 6, l. 5, § 2; Id. tit. 7, l. 13, 14.

[3] Dig. Lib. 13, tit. 7, l. 14.

[4] Inst. Lib. 3, tit. 15, § 4; Ayliffe, Pand. B. 4, tit. 1, p. 531.

[5] Jones on Bailm. 29, 30, 31; Pothier, de Nantissement, n. 32, 33, 34; Pothier on Obligations, n. 142; 1 Domat, B. 3, tit. 1, § 4, art. 1; Ersk. Inst. B. 3, tit. 1, § 33; 1 Bell, Comm. 453, 5th edit.; 1 Bell, Comm. § 389, 4th edit.

[6] Jones on Bailm. 75 to 83.

[7] Ante, § 38, 39.

[8] Jones on Bailm. 76, 78, 79, 81; Id. 43, 44, 109, 110, 119; Ante, § 38, 39.

[9] Jones on Bailm. 98; Vere *v.* Smith, 1 Vent. 121.

influence upon his judgment. It may not be unimportant in this connection to review the doctrine of Sir William Jones a little more at large than has been already done, since he puts himself in direct opposition to Lord Coke, and has bestowed an elaborate criticism on the opinion of the latter.

§ 334. Lord Coke, in his Institutes, has said:[1] "If goods be delivered to one as a gage or pledge, and they be stolen, he shall be discharged, because he hath a property in them; and therefore he ought to keep them no otherwise than his own." To which Sir William Jones, with unusual point, has replied: "I deny the first proposition, the reason, and the conclusion."[2] The first proposition is, that, if goods in pledge are stolen, the pawnee is discharged. Sir William Jones asserts the contrary; and says, that a bailee cannot be considered as using ordinary diligence, who suffers the goods to be taken by stealth out of his custody. But for this position he cites no common-law authority, except a dictum of Mr. Justice Cottesmore, in 10 H. 2. 21, 5. who said: "If I grant goods to a man to keep for my use, if the goods by his default [*mesgarde*, i. e. inattention] are stolen, he shall be chargeable to me for the same goods; but if he is robbed of the same goods, he is excusable by law."[3] Now the case here put is plainly a mere deposit, where the bailee is responsible only for gross neglect; and if Mr. Justice Cottesmore meant more, he was wrong in point of law. But in fact he was not drawing any distinction between cases of theft, and cases of robbery, as to the presumption of neglect; but between cases of losses by theft by neglect of the bailee, and cases of robbery by superior force, as affecting, in opposite manners, the responsibility of the bailee. The dictum, therefore, furnishes no authority to the purpose; and, exclusively of this dictum, the sole reliance of Sir William Jones is on the text of the Roman law and the commentaries of the civilians.[4] Even if the true purport of the text of the Roman law (as well as the commentaries of the civilians

[1] 1 Inst. 89, a; 4 Rep. 83, B.

[2] Jones on Bailm. 75.

[3] Jones on Bailm. 44, note; Id. p. 79.

[4] Ante, § 38, 39.

thereon), were not open to controversy, and susceptible of various explanations, the application thereof as an authority in the common law is not admitted.[1] There is, then, no authority at the common law, which maintains the argument of Sir William Jones.

§ 335. But there are common-law authorities, which are directly the other way. In Vere *v.* Smith,[2] which was a suit upon a bond to account, the defendant pleaded, that he locked up the money in his master's warehouse, and it was stolen from thence (not saying without any default on his part), and it was adjudged, that the plea was a good bar to the action, and a sufficient accounting within the condition of the bond. In the case cited from Fitzherbert's Abridgment, in 8 Edw. 2,[3]

[1] It may perhaps after all admit of doubt, whether, as a general rule, theft was deemed even in the civil law as necessarily *per se* importing negligence, or presumption of negligence. The text of the Digest relied on by Sir William Jones to establish it, is that which makes a partner liable for a loss by theft of a flock of sheep left with him by his partner to depasture. Damna, quæ imprudentibus accidunt (says the Digest, Lib. 17, tit. 2, l. 52, § 3; Pothier, Pand. Lib. 17, tit. 2, n. 36), hoc est, damna fatalia, socii non cogentur præstare. Ideoque, si pecus æstimatum datum sit, et id latrocinio aut incendio perierit, commune damnum est; si nihil dolo aut culpâ acciderit ejus, qui æstimatum pecus acceperit. Quod si à furibus subreptum sit, proprium ejus detrimentum est, quia custodiam præstare debuit, qui æstimatum accepit. Hæc vera sunt, et pro socio erit actio, si modo societatis contrahendæ causa pascenda data sunt, quamvis æstimata. Now, in the case of a flock of sheep, it may be that there could scarcely be a loss by theft without some negligence, or even without gross negligence, when in other cases theft might be without any the slightest negligence. Upon this text in Van Leeuwen's edition of the Corpus Juris Civilis (1726), with Gothofred's Notes, is the following commentary: Socius socio non præstat damnum fatale a Latronibus acceptum, licet a furibus præstet. Cur? Adversus Latrones parum prodest custodia; adversus furem prodesse potest, si quis advigilet. Latrocinium fatale damnum; sed casus fortuitus est; at non furtum. The reasoning can only apply, where vigilance would in the ordinary course of things have guarded against the theft, and, therefore, where the omission implied negligence. But there are many cases, where theft may be committed, against which no reasonable diligence could guard the bailee. See Ante, § 38, 39, and the comments there stated. Besides, in many cases, where the thing bailed is valued, the Roman law presumed that the party took upon himself extraordinary risks. See Ante, § 253, 254. See also, 1 Domat, B. 1, tit. 7, § 3, art. 5; Just. Inst. Lib. 3, tit. 15, § 3.

[2] 1 Vent. R. 121.

[3] Fitz. Abridg. *Detinue*, 59.

where goods were locked in a chest and left with the bailee, and the owner kept the key, and the goods were stolen, the bailee was held to be discharged. The whole reasoning of Lord Holt, in Coggs *v.* Bernard,[1] proceeds upon the ground, that theft is not presumptive of negligence. In the case even of a gratuitous loan, he says: "If the bailee puts the horse lent into his stable, and he is stolen from thence, the bailee is not answerable. But if he leaves the stable doors open, and thieves steal the horse, he is chargeable; because the neglect gave the thieves the occasion to steal the horse."[2] The case found in the Book of Assises,[3] and cited by Sir William Jones in another page,[4] is directly in point in favor of Lord Coke's opinion. The action was detinue for a hamper, which had been bailed, and the bailee pleaded, that it had been delivered to him in gage for a certain sum of money; that he had put it among his other goods; and that all the goods had been stolen together from him. On that occasion, the Chief Justice said: "If a man bails me goods to keep, and I put them among my own, I shall not be charged, if they be stolen." And the plaintiff was driven to reply, that "he had tendered the money before the stealing of the goods, and that the bailee (the creditor) refused to accept the money." To this case Sir William Jones gives no other answer, than that he suspects that by theft in this report was meant robbery, as Brook, in his Abridgment, had abridged the case with a marginal note, "Quant les biens sont robbes."[5] But, as we have the original case, we have just as good means to judge of its import as Brook; and the language of the Book of Assises is, that it was a case of theft. It is highly improbable, that, in a technical sense, there should have been any robbery, that is, a stealing of the hamper and other goods from the person of the bailee, or in his presence,

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[1] 2 Ld. Raym. 909, 912.

[2] 2 Ld. Raym. 916.

[3] Year Book, 29 Lib. Assisarum, 28; Bro. Abridg. *Bailment*, pl. 7.

[4] Jones on Bailm. 39, 40, 77, 78.

[5] 29 Lib. Assis. 28; Brook, Abridg. *Bailment*, 7; Jones on Bailm. 79. The word "robbes" is equivocal. Kelham in his Dictionary of the Norman Law French, gives it the meaning, "taken from, robbed."

with force, or by terror. The language of the case does not lead to any such conclusion; and the nature of the article, as well as the language of the Court, seems to point to it as a case of mere theft. The plea asserts the hamper to have been put among the other goods of the pawnee, which would seem to exclude the notion, that it was in his personal presence. In a modern case, Lord Kenyon held, that a bailee of goods kept for hire was not liable for a theft committed by his servants, although there were some prior suspicious circumstances impeaching their fidelity.[1] If, indeed, the circumstances of the particular case prove that the theft has been occasioned by negligence, or by want of proper caution, the pawnee may properly be held responsible for the loss.[2]

§ 336. The reason given by Lord Coke for his opinion is, that the pawnee has a special property therein. Sir William Jones says, that this is no reason at all; for every bailee has a temporary, qualified property in the thing bailed.[3] In this assertion he has been shown, in some prior pages of these Commentaries, to be incorrect;[4] for neither depositaries, nor mandataries, nor borrowers, have any special property in the thing bailed; although, as they have a lawful possession, and they are answerable over, they may maintain an action for any tort done to the thing bailed during the time of their possession.[5] The reason given by Lord Coke is not indeed the true reason; but the true reason is (as Lord Holt says), that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods.[6]

§ 337. Then, as to the conclusion of Lord Coke, that therefore the bailee ought to keep the goods merely as his own. This is certainly open to the criticism made upon it by Sir William Jones, that it does not express the true rule of law;

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[1] Finucane *v.* Small, 1 Esp. R. 315. And see Butt *v.* Great Western Railway Co. 7 Eng. Law & Eq. R. 448.

[2] Clarke *v.* Earnshaw, 1 Gow, R. 30; Post, § 338.

[3] Jones on Bailm. 80, 81.

[4] Ante, § 93 to 95, 150, 279.

[5] Ante, § 93 to 95, 150, 152, 191, 279, 280.

[6] Coggs *v.* Bernard, 2 Ld. Raym. 909, 916, 917; Jones on Bailm. 82.

for the bailee is bound "to take more care of the goods bailed than of his own, unless he be in fact a prudent and thoughtful manager of his own concerns; since every man ought to use ordinary diligence in affairs, which concern another as well as himself."[1] But where a bailee takes the same care of the pledge as he does of his own goods, and both are lost by theft, that furnishes *primâ facie* a presumption of ordinary diligence; for every man will be presumed to exercise common diligence in respect to his own affairs and property, until the contrary is shown. In other words, every man will be presumed to do his duty, until the contrary appears. And if the bailee is shown to have taken less care of the bailed goods than of his own, that may furnish a strong, and perhaps in some cases a decisive, presumption of negligence.[2] Indeed, Sir William Jones himself admits, that the particular character of the bailee may, under some circumstances, enter into the contract, and qualify it, making him, if known to be a very negligent man, not liable, unless the loss is occasioned by more than his habitual negligence; and, on the other hand, if he is known to be a very diligent man, making him liable for losses occasioned by less than his habitual diligence.[3] Lord Holt, also, has proceeded upon the like presumption of due diligence, where a man takes the same care of the bailed goods that he does of his own.[4] So that, although Lord Coke's conclusion may not be strictly logical, yet it is not, according to the ordinary presumption of law, far from the truth; and at all events it does not leave Sir William Jones in possession of such a victory as he supposes, since Lord Coke's main proposition remains unshaken.

§ 338. The true principle supported by the authorities seems to be, that theft, *per se*, establishes neither responsibility nor

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[1] Jones on Bailm. 82, 83; Id. 30, which cites Pothier, Observation Generale, now printed at the end of his Treatise on Obligations, in all the modern French editions. See Ante, § 17, note (2); Pothier, Louage, n. 190, 192, 429.

[2] Jones on Bailm. 30, 31, 46, 47, 82; Clarke *v.* Earnshaw, 1 Gow, R. 38; Post, § 407.

[3] Jones on Bailm. 46, 47; Id. 30, citing Pothier, ubi supra, § 337, n. b.

[4] 2 Ld. Raym. 909, 914, 915.

irresponsibility in the bailee.[1] If the theft is occasioned by any negligence, the bailee is responsible; if without any negligence, he is discharged. Ordinary diligence is not disproved, even presumptively, by mere theft; but the proper conclusion must be drawn from weighing all the circumstances of the particular case.[2] This is the just doctrine to which the learned mind of Mr. Chancellor Kent has arrived, after a large survey of the authorities;[3] and it seems at once rational and convenient.

§ 339. Another duty of the pawnee is, to return the pledge and its increments, if any, after the debt or other duty has been discharged.[4] Of course this debt or duty is by the common law extinguished, when the pledge is lost by casualty or other unavoidable accident, or it perishes through its own intrinsic defects, without the default of the pawnee.[5] The same rule applies, when the pawn is lost by robbery, or by superior force, or even by theft, if the pawnee has exercised reasonable diligence. The same doctrine will also be found in the Roman law. Its language is: *Pignus in bonis debitoris permanere, ideoque ipsi perire in dubium non venit.*[6] *Quæ fortuitis casibus accidunt, cum prævideri non potuerint (in quibus etiam aggressura latronum est) nullo bonæ fidei judicio præstantur; et ideo creditor pignora, quæ hujusmodi casu interierint, præstare non compellitur, nec a petitione debiti submovetur, nisi inter contrahentes placuerit, ut amissio pignorum liberet debitorem.*[7] *Si creditor sine vitio suo argentum pignori datum perdiderit, restituere id non cogitur.*[8] The modern nations of Continental Europe have fully recognized and adopted the like doctrine.[9] It is not, however, sufficient for the pawnee to allege that there has been such

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[1] Ante, § 38, 39.

[2] Ibid.

[3] 2 Kent, Comm. Lect. 40, p. 580, 581, 4th edit.

[4] Isaack *v.* Clark, 2 Bulst. R. 306; Pothier, de Nantissement, n. 29, 35.

[5] Coggs *v.* Bernard, 2 Ld. Raym. 909.

[6] Cod. Lib. 4, tit. 24, l. 9.

[7] Cod. Lib. 4, tit. 24, l. 6.

[8] Cod. Lib. 4, tit. 24, l. 5.

[9] Pothier, de Nantissement, n. 29, 30; 1 Domat, B. 3, tit. 1, § 4, art. 2, 7; Cod. Lib. 8, tit. 14, l. 19; Ayliffe, Pand. B. 4, tit. 18, p. 541; Cod. Lib. 4, tit. 24, l. 5, 9; 1 Domat, B. 3, tit. 1, § 4, art. 6.

a loss. It must be established by proper proofs. And it would seem, that in the Roman and foreign law the *onus probandi* is on the pawnee, to establish the loss to be by such casualty, superior force, or intrinsic defect. *Sed, si culpæ reus deprehenditur, vel non probat manifestis rationibus se perdidisse, quanti debitoris interest, condemnari debet,*[1] is the language of the Roman law; and Pothier implicitly follows the text, as requiring, on the part of the pawnee, due proof of the accident, which has caused the loss, and that he was unable to prevent it.[2] The common law does not, probably, differ, when a suit is brought for the restitution of the pawn, after a due demand and refusal. In such a case, the demand and refusal would ordinarily be evidence of a tortious conversion of the pawn; and it would then be incumbent on the pawnee to give some evidence of a loss by casualty, or by superior force, independent of his own statement, unless, indeed, upon the demand and refusal, he should state the circumstances of the loss; and then the whole statement must be taken together, and submitted to the jury, who would, under all the circumstances, decide whether it was a satisfactory account, or not.[3] But, if a suit should be brought against the pawnee for a negligent loss of the pawn, there it would be incumbent upon the plaintiff to support the allegations of his declaration by proper proofs, and the *onus probandi*, in respect to negligence, would be thrown on him.[4] In such an action for a negligent loss, brought against the bailee, it seems that his acts and remarks, contemporaneous with the loss, are admissible evidence in his favor, to establish the nature of the loss.[5]

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[1] Cod. Lib. 4, tit. 24, l. 5.

[2] Pothier, de Nantissement, n. 31. See Post, § 254.

[3] Anon. 2 Salk. R. 655; Platt *v.* Hibbard, 7 Cowen, R. 500, note (a); Forward *v.* Pittard, 1 Term R. 33; Isaack *v.* Clark, 2 Bulst. R. 306; Ante, § 213, 278; Post, § 410, 454, 529; Beardslee *v.* Richardson, 11 Wend. R. 25; Doorman *v.* Jenkins, 2 Adolph. & Ellis, R. 256; Tompkins *v.* Saltmarsh, 14 Serg. & Rawle, 275.

[4] Cooper *v.* Barton, 3 Camp. R. 5; Harris *v.* Packwood, 3 Taunt. R. 264; Marsh *v.* Horne, 5 Barn. & Cressw. 322. But see Platt *v.* Hibbard, 7 Cowen, R. 497; Ante, § 213 and note; Id. § 278; Post, § 410, 454, 529.

[5] Tompkins *v.* Saltmarsh, 14 Serg. & R. 275. See Beardslee *v.* Richardson, 11 Wend. R. 25; Doorman *v.* Jenkins, 2 Adolph. & Ellis, R. 256.

§ 340. If the party who pledged the goods was not the owner of them, the pawnee may defend himself by showing that he has delivered over the goods to the real owner, unless the pawnor has a special property, which he is entitled under the circumstances, to assert against the owner.[1] The general rule in such cases, subject, however, to some exceptions, is that of the Roman law: *Nemo plus juris ad alium transferre potest, quam ipse haberet.*[2] The exceptions are founded upon the public policy of protecting *bonâ fide* purchasers, under peculiar circumstances.[3] If the pawnee hold the pledge, merely as a pledge from the owner, the second pawnee may discharge himself from any obligation to the owner, by delivering it up to his own pledgor at any time before an offer to redeem is made by the owner.[4]

§ 341. The pawnee makes himself responsible for all losses and accidents, whenever he has done any act inconsistent with his duty, or has refused to perform his duty. If, therefore, the pawnor makes a tender of the full amount of the debt, for which the pawn is given, and the pawnee refuses to receive it, or to redeliver the pledge, the special property which he has in it is determined, and he is henceforth treated as a wrongdoer, and the pawn is at his sole risk.[5] The same rule applies to all cases of a misuser or conversion of the pawn by the pawnee.[6] The rule, however, must be understood with the same qualifications as in other cases, that the same loss or accident would not otherwise have inevitably happened; for if it would and

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[1] See Pothier, de Nantissement, n. 7, 27; Ante, § 291. See Ogle *v.* Atkinson, 5 Taunt. R. 759; Cheesman *v.* Excell, 4 Eng. Law & Eq. R. 440; Bates *v.* Stanton, 1 Duer, 79; Pitt *v.* Albritton, 12 Iredell, N. Car. 77.

[2] Pothier, de Nantissement, n. 27; Dig. Lib. 50, tit. 17, § 4.

[3] See Story on Agency, § 125 to 134; Id. 93, § 227, 228.

[4] Jarvis *v.* Rogers, 15 Mass. R. 389.

[5] Coggs *v.* Bernard, 2 Ld. Raym. 909, 916, 917; Anon. 2 Salk. R. 522; Jones on Bailm. 79, 80; Bac. Abridg. *Bailment*, B.; Id. *Trover*, C.; Ratcliff *v.* Davis, Yelv. R. 178; Bull. N. P. 72; Parks *v.* Hall, 2 Pick. R. 206; Pothier, de Nantissement, n. 51.

[6] De Tollenere *v.* Fuller, 1 So. Car. Const. Ct. Rep. 121; 1 Domat, B. 3, tit. 1, § 4, art. 1, 2, 3; Pothier, de Nantissement, n. 51.

must have happened at all events, then, perhaps, he might not be liable for the loss. But of this, more hereafter.[1]

§ 342. The defaults by which the pawnee may render himself responsible are not only those which consist in acts of commission (*in admittendo*), but also in omissions of duty (*in omittendo*); for the pawnee is bound to apply all proper care for the preservation of the pledge. He is not, therefore, less liable, if by his neglect he suffers a mirror, which is pawned to him, to be ruined or lost, than he would be if he had broken it by an improper use, or even by a mere wilful act.[2]

§ 343. Another duty of the pawnee at the common law is, to render a due account of all the income, profits, and advantages derived by him from the pledge, in all cases where such an account is within the scope of the bailment.[3] If, for instance, the pawn is a slave, the profits of his labor are to be accounted for.[4] If the pawn consists of cows, horses, or other cattle, the profits of their labor are also to be accounted for, if within the contemplation of the parties. The Roman and foreign law seem, in all cases of this sort, to imply an obligation to account, from the very nature of such a pledge.[5] In rendering an account of the profits, the pawnee is at liberty to charge all the necessary costs and expenses, to which he has been put, and to deduct them from the income or profits.[6] If he has sold the pledge, he is bound to account for the proceeds, and to pay over to the pawnor the surplus beyond his debt, or other demand, and the necessary expenses and charges.[7] Pothier thinks, that the duty of the pawnee goes further; and that he is bound to account for all the profits and income which he

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[1] See Post, § 413 a to 413 d.

[2] Pothier, de Nantissement, n. 33.

[3] Ante, § 329 to 331; Pothier, de Nantissement, n. 35, 37, 40, 41.

[4] Hinton *v.* Holliday, 1 N. Carol. Law Journ. 87; Ante, § 329, 330, 331; Geron *v.* Geron, 15 Ala. 562; Code of Louisiana of 1825, art. 3135.

[5] Ante, § 329, 331; Code of Louisiana of 1825, art. 3135; Pothier, de Nantissement, n. 35, 37, 40, 41.

[6] 1 Domat, B. 3, tit. 1, § 3, art. 19; Id. § 4, art. 4, 5; Pothier, de Nantissement, n. 35, 37, 40, 41; Ersk. Inst. B. 3, tit. 1, § 33; 2 Kent, Comm. Lect. 40, p. 583, 4th edit.; Post, § 357.

[7] Pothier, de Nantissement, n. 35, 37, 40, 41.

might have received from the pledge, but for his own negligence.[1] This would, doubtless, be true in the common law, in all cases where there is an implied obligation to employ the pledge at a profit. As, if there is a pledge of money, and it is agreed that it shall be let out at interest by the pawnee, and he has neglected his duty. So, if it is contemplated between the parties, that the pledge shall be employed in its usual business upon profit; as a ferry-boat at a ferry, or a coach and horses in the customary carriage of passengers.

§ 344. There was a peculiar sort of pledge or mortgage in the Roman law, called *Antichresis*, whereby the creditor was entitled to take the profits of the pledge (as, for instance, of lands or animals), as a compensation for, and in lieu of, interest. This mode of contract was not held illegal in the Roman law, unless it was made a cover for some illegal act, or for some oppressive usury.[2] But in the modern Continental nations, it seems, from its tendency to give the creditor an oppressive power, and to cover usury, to be generally discountenanced; for, in all such cases, the party is bound to account for the profits, deducting his expenses, and then is simply allowed his interest.[3] This, also, seems to be the general rule adopted in England. Welsh mortgages bear, in many respects, a close resemblance to the contract of antichresis, as the mortgagee is entitled to receive the profits in lieu of interest. But this kind of mortgage, though formerly much in use, is now in a great measure obsolete. It does not seem ever to have been applied to mere personalty.[4]

§ 345. In the natural order of the subject, we are next led to a consideration of the rights and duties of the pledgor. And, in the first place, as to his right of redemption. If the pledge is conveyed by way of mortgage, and thus passes the legal title, unless the pledge is redeemed at the stipulated time,

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[1] Pothier, de Nantissement, n. 36; Ayliffe, Pand. B. 4, tit. 18, p. 533.

[2] 1 Domat, B. 3, tit. 1, § 1, art. 28; Id. § 4, art. 5; Pothier, de Nantissement, n. 20; Ayliffe, Pand. B. 4, tit. 18, p. 525; Code of Louisiana, art. 3102, 3143; Livingston *v.* Story, 11 Peters, R. 351.

[3] Ibid.

[4] 1 Powell on Mortgages, by Coventry & Rand, p. 373 a, and note (E).

the title of the pledgee becomes absolute at law; and the pledgor has no remedy at law, but only a remedy in equity to redeem.[1] If, however, the transaction is not a transfer of ownership, but a mere pledge, as the pledgor has never parted with the general title, he may at law redeem, notwithstanding he has not strictly complied with the conditions of his contract.[2] If a clause is inserted in the original contract, providing, that, if the terms of the contract are not strictly fulfilled at the time and in the mode prescribed, the pledge shall be irredeemable, it will not be of any avail. For the common law deems such a stipulation unconscionable and void, upon the ground of public policy, as tending to the oppression of debtors.[3] The Roman law treated a similar stipulation (called in that law *lex commissoria*) in the same manner, holding it to be a mere nullity.[4] However, the Roman law allowed the parties to agree, that, upon default in payment, the creditor might take the pledge at a stipulated price, provided it was its reasonable value, and the transaction was *bonâ fide*. In both respects the modern Continental nations of Europe have adopted the Roman law.[5] Whether the same principle exists in the common law does not appear to have been decided. But there is no doubt, that a subsequent agreement to that effect, or a subsequent waiver of the right to redeem, if made under proper circumstances, would be held binding between the parties.[6]

§ 346. It is clear, by the common law, that, in cases of a mere pledge, if a stipulated time is fixed for the payment of the debt, and the debt is not paid at the time, the absolute property does not pass to the pledgee. This doctrine is, at

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[1] Jones *v.* Smith, 2 Ves. jr. 378; Cortelyou *v.* Lansing, 2 Cain. Cas. in Err. 200; Ante, § 287, 308 to 311.

[2] Com. Dig. *Mortgage*, B.; 1 Powell on Mortgage, by Coventry & Rand, 401, and notes, ibid.; Ante, § 287, 308 to 311.

[3] Cortelyou *v.* Lansing, 2 Cain. Cas. in Err. 200; 2 Kent, Comm. Lect. 40, p. 581 to 583, 4th edit.

[4] 1 Domat, B. 3, tit. 1, § 3, art. 11; Pothier, de Nantissement, n. 18; 2 Kent, Comm. Lect. 40, p. 583, 4th edit.

[5] 1 Domat, B. 3, tit. 1, § 3, art. 11; Pothier, de Nantissement, n. 19.

[6] Stevens *v.* Bell, 6 Mass. R. 339.

least, as old as the time of Glanville.[1] If the pawnee does not choose to exercise his acknowledged right to sell, he still retains the property as a pledge, and, upon a tender of the debt, he may at any time be compelled to restore it; for prescription or the statute of limitations does not run against it.[2] However, after a long lapse of time, if no claim for a redemption is made, the right will be deemed to be extinguished; and the property will be held to belong absolutely to the pawnee. Under such circumstances, a court of equity will decline to entertain any suit for the purpose of a redemption. A like rule is adopted in the common law in case of mortgages.[3]

§ 347. The Roman law also has declared, that prescription shall not run against the pawnor in respect to the pawn; for the pawnee is always considered to hold by his title, as such, until some other title supervenes.[4] *Neminem sibi ipsum causam possessionis mutare posse.*[5] But, nevertheless, where the title of the pawnee has remained undisturbed for a great length of time, it seems that such an extraordinary prescription may be insisted on as a bar, for the sake of the repose of titles founded on long possession.[6]

§ 348. But, where no time of redemption is fixed by the contract, there, upon the general principles of law, the pawnor has his whole life to redeem,[7] unless he is previously quickened, as he may be, by the pawnee, through the instrumentality of a

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[1] Glanville, Lib. 10, ch. 6; 1 Reeves's Hist. 161, 163; Cortelyou *v.* Lansing, 2 Cain. Cas. in Err. 200; Ratcliff *v.* Davis, 1 Bulst. R. 29; s. c. Yelv. R. 178; Ante, § 308 to 310.

[2] Kemp *v.* Westbrook, 1 Ves. R. 278.

[3] Lockwood *v.* Ewer, 2 Atk. R. 303; Mathews on Presump. Evid. 20, 331; Powell on Mortgages, Coventry & Rand's edit., Coventry's note, 401.

[4] Pothier, de Nantissement, n. 53; Cod. Lib. 4, tit. 24, l. 10, 12; Ayliffe, Pand. B. 4, tit. 18, p. 531; 1 Domat, B. 3, tit. 1, § 4, art. 7; Id. tit. 7, § 5, art. 11, 12; Dig. Lib. 44, tit. 3, l. 12; Dig. Lib. 41, tit. 3, l. 13.

[5] Dig. Lib. 41, tit. 2, l. 3, § 19; Pothier, de Nantissement, n. 53.

[6] Ayliffe, Pand. B. 4, tit. 18, p. 531; Cod. Lib. 7, tit. 7, tit. 39, l. 4, 9; 1 Domat, B. 3, tit. 7, § 4, art. 14, and note of the author.

[7] Com. Dig. *Mortgage*, B.; Ratcliff *v.* Davis, Yelv. R. 178, 179; Cortelyou *v.* Lansing, 2 Cain. Cas. in Err. 200; Bac. Abridg. *Bailment*, B.; 2 Kent, Comm. Lect. 40, p. 581, 582, 4th edit.

court of equity, or by notice *in pais* to the party.[1] A question has arisen, whether, if the pawnor dies without redeeming, the right survives to his personal representatives. In one case,[2] it seems to have been thought by the Court, that the right expired with the pawnor's life. However, there have been cases in equity, in which the right has been enforced in favor of the representatives of the pawnor; and this seems, according to modern opinions, the true doctrine.[3] If the pawnee dies before redemption, the pawnor may still redeem against his representatives.[4]

§ 349. If, at the time when the pledgor applies to redeem, the pledge has been sold by the pledgee, without any proper notice to the former, no tender of the debt due need be made before bringing an action therefor; for the party has incapacitated himself to comply with his contract to return the pledge.[5] The same rule applies, where the pledgee dispenses with a tender; as if he refuses under any circumstances to restore the pledge.[6] But, if an action is brought, the pledgee may recoup his debt in the damages.[7]

§ 350. Subject to the rights of the pledgee, the owner has a right to sell or assign his property in the pawn; and in such a case, the vendee will be substituted for the pledgor, and the pledgee will be bound to allow him to redeem, and to account with him for the pledge, and its proceeds. If he refuses, an action at law will lie for damages, as well as a bill in equity to compel a redemption and account.[8]

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[1] Cortelyou *v.* Lansing, 2 Cain. Cas. in Err. 200; Hart *v.* Ten Eyck, 2 Johns. Ch. R. 62; Garlick *v.* James, 12 Johns. R. 146; 2 Kent, Comm. Lect. 40, p. 581, 582, 4th edit.

[2] Ratcliff *v.* Davis, Yelv. R. 178; s. c. 1 Bulst. R. 29; s. c. Noy, R. 137; s. c. Cro. Jac. 244.

[3] Demandray *v.* Metcalf, Prec. Ch. 420; 2 Vern. R. 691, 698; Vanderzee *v.* Willis, 3 Bro. Ch. R. 21; Cortelyou *v.* Lansing, 2 Cain. Cas. in Err. 200.

[4] Com. Dig. *Mortgage*, B.

[5] Cortelyou *v.* Lansing, 2 Cain. Cas. in Err. 200; McLean *v.* Walker, 10 Johns. R. 472; Stearns *v.* Marsh, 4 Denio, R. 227.

[6] Cortelyou *v.* Lansing, 2 Cain. Cas. in Err. 200, and cases cited; Id. 214.

[7] Jarvis *v.* Rogers, 15 Mass. R. 389; Stearns *v.* Marsh, 4 Denio, R. 227. See Ward *v.* Fellers, 3 Mich. 288.

[8] Franklin *v.* Neate, 13 M. & W. 481; Magee *v.* Toland, 8 Porter, 36;

§ 351. In every case, where the pledge has suffered any injury by the default of the pledgee, the owner is entitled to a recompense in proportion to the damages sustained by him. But, in estimating the damages, no compensation is to be made for any injury which has arisen by accident, or from the natural decay of the pledge.[1]

§ 352. As the general property of goods pawned remains in the pawnor, and the pawnee has a special property only,[2] the latter (as we have seen), as well as the former, may maintain an action against a stranger for any injury done to it, or for any conversion of it.[3] Where a stranger comes into possession under a wrongful title from the pawnee, the owner, having a right to consider the bailment, for many purposes, at an end, if not for all, may recover it against the stranger, and hold him liable for damages.[4] But where there is any injury or conversion by a stranger, for which an action lies both by the pawnor and pawnee, a recovery by either of them will oust the other of his right to recover; for there cannot be a double satisfaction.[5] This is true, as a general rule. But it deserves consideration, whether the owner can, by his recovery of the pledge itself, or of damages for the conversion of it, against a stranger, oust the pledgee of his security in the pledge or its proceeds. And if the pledgee has recovered damages against a stranger only to the extent of his own lien, it may

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Ratcliffe *v.* Vance, 2 Rep. Const. Ct. So. Car. 239; Kemp *v.* Westbrook, 1 Ves. 778; Hunt *v.* Holton, 13 Pick. R. 220; Tuxworth *v.* Moore, 9 Pick. R. 347; Whitaker *v.* Sumner, 20 Pick. R. 399, 405; Ante, § 324 to 328.

[1] Pothier, de Nantissement, n. 38, 39.

[2] Ante, § 287.

[3] Bac. Abridg. *Trover*, C.; 2 Black. Comm. 453; 1 Roll. Abridg. 569, pl. 5. See Pain *v.* Whittaker, 1 R. & M. 99; Gordon *v.* Harper, 7 T. R. 9; Ante, § 93, 94, 95, 150, 152; Nicolls *v.* Bastard, 2 Cromp. Mees. & Rosc. 659, 660.

[4] Newsom *v.* Thornton, 6 East, 17; Martini *v.* Coles, 1 M. & Selw. 140; Pickering *v.* Busk, 15 East, 38; McCombie *v.* Davies, 6 East, 538; Dillenback, *v.* Jerome, 7 Cowen, R. 294; Smith *v.* James, 7 Cowen, R. 328; Ante, § 324–327; Story on Agency, § 113 and note; Id. § 225, 227.

[5] Bac. Abr. *Trover*, C.; Rooth *v.* Wilson, 1 Barn. & Ald. 59; Bush *v.* Lyon, 9 Cowen, R. 52; Smith *v.* James, 7 Cowen, R. 328; Nicolls *v.* Bastard, 2 Cromp. Mees. & Rosc. 659, 660; 2 Saund. Rep. 47 c, Williams's note; Ante, § 94, 150, 152.

further deserve consideration, whether, upon suitable proofs, the owner may not also be entitled to recover for the surplus. However, these are propounded merely as matters open to further inquiry. Where the pledgee is ousted of his possession by a mere stranger, it is said that he is entitled to recover the full value of the pledge.[1] But where the pledge has been wrongfully taken possession of, and retained by the owner, or by one acting under his authority, or with his assent, there the pledgee is entitled to recover damages only to the amount of his lien.[2]

§ 353. Goods pawned, are not liable to be taken in execution in an action against the pawnor;[3] at least, not unless the bailment is terminated by payment of the debt, or by some other extinguishment of the pawnee's title.[4] This is the rule

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[1] Lyle *v.* Barker, 5 Binn. R. 457; Heydon & Smith's case, 13 Co. Rep. 67; Ante, § 93; Ingersoll *v.* Van Bokkelin, 7 Cowen, R. 670, and note (a); Pomeroy *v.* Smith, 17 Pick. R. 85.

[2] Ingersoll *v.* Van Bokkelin, 7 Cowen, R. 670, 681, and note; Lyle *v.* Barker, 5 Binn. R. 457; Heydon & Smith's case, 13 Co. Rep. 69. See Benjamin *v.* Stremple, 13 Illinois, 468.

[3] [But see Stief *v.* Hart, 1 Comstock (N. Y.), R. 20, where it was decided that a sheriff holding an execution against a pledgor may by virtue thereof take the property pledged out of the hands of the pledgee into his own possession, and sell the right and interest of the pledgor therein.]

[4] Coggs *v.* Bernard, Holt's Rep. 528, 529; Badlam *v.* Tucker, 1 Pick. R. 389; Bigelow *v.* Willson, 1 Pick. R. 485; Marsh *v.* Lawrence, 4 Cowen, R. 461; 1 Dane, Abridg. ch. 17, art. 4, § 3; Pomeroy *v.* Smith, 17 Pick. R. 85. By a special statute provision in Massachusetts, pledges may be attached by the creditors of the pledgor upon a tender of the amount due on the pledge, or the pledgee may be summoned as his trustee to answer for the surplus. Revised Statutes, 1836, ch. 90, § 78, 79, 80; Id. ch. 109, § 25, 26; Pomeroy *v.* Smith, 17 Pick. R. 85. See also, Wheeler *v.* McFarland, 10 Wend. R. 318. Whether, in case of a pledge of personal property, the property can be levied on under an execution by a creditor of the pledgee, so as to sell and pass the pledgee's title therein, is a point upon which no direct adjudication has been made.

In the case of a mortgage of personal property, it has been held, that, after a forfeiture by nonpayment of the debt, the property may be levied on under an execution by a creditor of the mortgagee, even although the property is in the possession of the mortgagor. Ferguson *v.* Lee, 9 Wend. R. 258. But *quære*, whether in such a case the equity of redemption of the mortgagor would be destroyed, or whether it would subsist against the purchaser at the sheriff's sale.

in cases of executions at the suit of private persons. But it would seem, that in the case of the Crown the pawn may be taken generally, on satisfaction of the debt to the pawnee, or taken and sold subject to his right.[1]

§ 354. In the next place, as to the duties and obligations of the pawnor. By the act of pawning, the pawnor enters into an implied engagement or warranty, that he is the owner of the property pawned; and, unless he gives notice of a different interest, that he is the general owner; and that he has good right to pass the pawn. If he violates this engagement, either by a tortious or by an innocent bailment of property, which is not his own, or by exceeding his interest therein, he is liable to the pawnee in an action for damages.[2] It follows, that the pawnor is under an implied engagement not to retake the pledge, or in any manner to interfere with the rights of the pawnee.

§ 355. If the pawn has a defect, unknown to the pawnee, which destroys its value, the French law gives him a right of action for another pawn in its stead.[3] This seems highly reasonable; the common law, however, does not give any such right. But in such a case, an action will lie at the common law against the pawnor, upon his implied engagement or warranty of title; and, *a fortiori*, if any fraud is practised by the pawnor, an action for damages will doubtless lie against him. Perhaps, also, the whole contract may, under such circumstances, at the option of the pawnee, be rescinded by a court of equity.

§ 356. The pawnor, indeed, is in all cases of this sort bound to good faith, and is responsible for all frauds, not only in the title, but in the concoction of the contract.[4] Thus, if he should fraudulently misrepresent the nature or quality of the thing pledged, as for example, if he should pledge a vase of brass, asserting it to be gold, he would be liable therefor; for it is a

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[1] 2 Chitty on Prerog. ch. 12, P. 1, § 5, p. 285, 286.

[2] Pothier, de Nantissement, n. 54, 55, 56; Dig. Lib. 13, tit. 7, l. 32; Id. l. 16.

[3] Pothier, de Nantissement, n. 57.

[4] Pothier, de Nantissement, n. 59.

rule of the common law, that fraud vitiates every contract; and damages, by way of recompense, may be recovered for all losses and injuries occasioned by fraud. The like rule prevails in the Roman law; and indeed fraud is therein denounced with studied reprobation. *Si quis in pignore pro auro æs subjecisset creditori, qualiter tenetur? Si quidem dato auro æs subjecisset, furti tenetur; quod, si in dando æs subjecisset, turpiter fecisse, non furem esse; sed et hic puto pigneratitium judicium locum habere.*[1] But, whenever there is a defect in the pawn, or in the title to it, there is no pretence to impute fraud, if the pawnee takes it with full knowledge of all the circumstances; for he is then bound by his contract, as he has chosen to make it; and, *volenti non fit injuria.* The Roman law has promulgated the like doctrine. *Si sciens creditor accipiat vel alienum, vel obligatum, vel morbosum, contrarium judicium ei non competit.*[2] The same doctrine is also fully recognized in the French law.[3]

§ 357. Another obligation of the pawnor, by the Roman law, is to reimburse to the pawnee all expenses and charges, which have been necessarily incurred by the latter in the preservation of the pawn,[4] even though, by some subsequent accident, these expenses and charges may not have secured any permanent benefit to the pawnor. No decision has been found in the common law directly upon this point. If there is an express contract to pay such expenses, that doubtless ought to govern the case. And where the circumstances of the case naturally lead to an implied agreement to the same effect, it will be equivalent to an express declaration. But whatever may be the rule, as to ordinary expenses and charges in a case of mutual silence, it seems but reasonable, that extraordinary expenses and charges, which could not have been foreseen, should be reimbursed by the pawnor. If, for instance, a horse is pawned, and he meets with an injury by accident, the ex-

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[1] Dig. Lib. 13, tit. 7, l. 36.

[2] Dig. Lib. 13, tit. 7, l. 16, § 1; Pothier, Pand. Lib. 13, tit. 7, n. 27.

[3] Pothier, de Nantissement, n. 58, 59.

[4] Pothier, de Nantissement, n. 60, 61; Dig. Lib. 13, tit. 7, l. 8; 1 Domat, B. 3, tit. 1, § 3, art. 19; Ante, § 306, 343.

penses of his cure seem justly chargeable upon the pawnor, as they are incurred for his ultimate benefit. So, if a ship, which is pledged, is injured by a storm, and expenses are necessary to preserve her from absolute foundering, such expenses seem properly to fall on the owner.[1]

§ 358. In respect to expenses which are not necessary, but still are useful to the thing pawned, the Roman law pursued a middle course, and left them to be allowed or disallowed by the proper judicial tribunal, according to circumstances. If the expenses were very large and onerous, they were not to be allowed. If moderate and beneficial, they might be allowed at the discretion of the Court.[2] The common law has not invested courts of justice with any such discretion, or allowed the pawnee any such latitude of expenditure, without the approbation of the pawnor, either express or implied.

§ 359. We come, in the last place, to the consideration of the manner in which the contract of pledge or mortgage is, or may be, extinguished. An extinguishment may arise in several ways. (1) By the full payment of the debt, or the discharge of the other engagements, for which the pledge was given.[3] *Si dominus solverit pecuniam, pignus quoque perimitur.*[4] (2) By a satisfaction of the debt, in any other mode, either in fact, or by operation of law; as for instance, by receiving other goods in payment or discharge of the debt.[5] *Item liberatur pignus, sive solutum est debitum, sive eo nomine satisfactum est.*[6]

§ 360. (3) An extinguishment of the right of pledge may also be by taking a higher or a different security for the debt (as, for example, a bond or obligation for a promissory note),

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[1] See Ante, § 121, 121 a, 154, 197, 256, 273, 306; Post, § 388, 389.

[2] Pothier, de Nantissement, n. 61; Dig. Lib. 13, tit. 7, l. 25; 1 Domat, B. 3, tit. 1, § 3, n. 20; Ayliffe, Pand. B. 4, tit. 18, p. 530, 531; Ante, § 121, 121 a, 154, 197, 236, 274.

[3] 1 Domat, B. 3, tit. 1, § 7, art. 1; Pothier, Pand. Lib. 20, tit. 6, § 1, l. 1–5; Ayliffe, Pand. B. 4, ch. 18, p. 536, 537.

[4] Dig. Lib. 20, tit. 1, l. 13, § 2.

[5] 1 Domat, B. 3, tit. 1, § 7, art. 4; Pothier, Pand. Lib. 20, tit. 6, § 4, l. 17, 20; Ayliffe, Pand. B. 4, tit. 18, p. 536, 537.

[6] Dig. Lib. 20, tit. 6, l. 6.

without any agreement that the pledge shall be retained therefor. This, in the Roman and foreign law, is called a *Novation;* and, as the original debt is thereby extinguished, the contract of pledge, which is but an accessory, is also extinguished. *Novata autem debiti obligatio pignus perimit, nisi convenit, ut pignus repetatur.*[1] But as no novation has the effect to extinguish a prior debt, unless such is the intention of the parties, it follows, that a mere change of the security will not extinguish the right to the pledge, without the express or implied assent of both parties.[2]

§ 361. (4) In the next place, whatever by operation of law extinguishes the debt, will extinguish the right to the pledge also. Therefore, if, in a suit brought by the pledgee for the debt the pledgor obtains a judgment in his own favor, which bars any future recovery of the debt, that will extinguish the right to the pledge.[3]

§ 362. (5) In the next place, if the right to the debt is barred by prescription, it is said in the Roman law that the right to the pledge is also gone.[4] This is equally true in the common law, when from the length of time there arises a presumption of the payment or discharge of the debt. But if there is merely a positive bar by the statute of limitations against a personal action for the debt, it may deserve consideration, how far this will oust the party of his right to retain the pledge towards satisfaction of the debt; for the possession of the pledge may be the very reason why the pledgee has omitted to bring a personal suit for the debt within the prescribed time. The pledgor is not ordinarily barred of his right to redeem the pledge, so long as the pledgee may be presumed to hold it as a pledge.[5] And the continued possession of the

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[1] 1 Domat, B. 3, tit. 7, § 7, art. 2, 4; Id. B. 4, tit. 3, § 1, art. 1 to 5; Pothier, Pand. Lib. 20, tit. 6, § 1, l. 6, 7; Ayliffe, Pand. B. 4, tit. 18, p. 536, 537; Dig. Lib. 13, tit. 7, l. 11, § 1.

[2] 1 Domat, B. 4, tit. 3, § 1, art. 1 to 5; Ayliffe, B. 4, tit. 18, p. 536, 537.

[3] 1 Domat, B. 3, tit. 7, § 1, art. 3; Pothier, Pand. Lib. 20, tit. 6, § 1, l. 8.

[4] 1 Domat, B. 3, tit. 7, § 4, art. 9; Pothier, Pand. Lib. 20, tit. 6, § 5, l. 37–40.

[5] [See accordingly, Spears *v.* Hartley, 3 Esp. R. 86; Thayer *v.* Mann, 19 Pick. 536; Reed *v.* Shepley, 6 Vermont, 602.]

pledgee, being founded upon the presumed consent of the pledgor, affords, under such circumstances, proof of the non-extinguishment of the debt, although the statute of limitations may present a bar to a mere personal action. On the other hand, if a very long period has elapsed, and the pledge has continued in the possession of the pledgee, it affords a presumption of the abandonment of it by the pledgor; and if any presumption of an extinguishment of the debt arises in such a case, it is an extinguishment by receiving the pledge in satisfaction. If, then, the statute of limitations has run against the debt, as a personal claim, and the pledgor seeks to recover back the pledge, why may not the pledgee avail himself of the protection of the same statute to bar such suit? If the pledgor insists, that it is still a pledge, why may not the other party avail himself of all the fair presumptions arising in the case, that the debt has not been in fact paid, or that the pledge has been deemed a satisfaction of it? Some of the adjudged cases seem silently to admit the existence of a right in the pledgee over the pledge, notwithstanding the lapse of a period exceeding that of the statute of limitations for a personal suit for the debt.[1] This, however, must be considered, in the absence of some direct authority, as a point merely propounded for further consideration. But if the pledgor admits the existence of the debt, and brings a bill to redeem, he can do so only upon payment of the debt, although the statute of limitations might otherwise be pleaded as a bar to it.

§ 363. (6) The right to the pledge is also gone, when the thing perishes. *Sicut re corporali extinctâ, ita et usufructu extincto, pignus hypothecave perit*, is the language of the Roman law.[2] If it undergoes any permanent and essential transmutation, it would seem, by the Roman law, that the right to it, under some circumstances, would be extinguished. Thus, if a wood should be delivered as a pledge, and a ship should be

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[1] Kemp *v.* Westbrook, 1 Ves. R. 278; Gage *v.* Bulkely, Ridg. Cas. Temp. Hard. 278; Ratcliff *v.* Davis, Yelv. R. 178, 179. See also, Pothier, Pand. Lib. 20, tit. 6, § 1, art. 2; 1 Powell on Mort. by Coventry & Rand, 401, and notes, ibid.; Higgins *v.* Scott, 2 Barn. & Adolph. 413.

[2] Dig. Lib. 20, tit. 6, l. 8; Pothier, Pand. Lib. 20, tit. 6, n. 12.

afterwards built of the trees, the ship would not be pledged, unless there were an express stipulation, that the trees, and whatever should be constructed out of them, should be equally subject to the pledge. *Si quis caverit, ut sylva sibi pignori esset, navem ex eâ materiâ factam non esse pignoris, Cassius ait; quia aliud sit materia, aliud navis. Et ideo nominatim in dando pignore adjiciendum esse, ait, quæque ex sylvâ facta natave sint.*[1] This example, perhaps, ought not to be deemed to furnish the foundation of any general rule, since in the building of a ship various other materials besides the trees, must have been used in the construction. Let us suppose a gold vase to be pledged, and then melted down into a bar of gold, or a bar of gold to be wrought into a vase, without the use of any other materials, and the question might then present itself in a very different aspect. However this may be, it seems certain, that, at the common law, the pledge is not thereby extinguished.[2] As far as the property can be traced, it will still be held a pledge by the common law, whatever transmutations it may have undergone without the assent of the pledgee.[3]

§ 364. (7) The right also is extinguished by any act of the pledgee, which amounts to a release or waiver of the pledge. This may be by a release in solemn form of the debt, or by any other discharge of the right to the pledge. But a release of a part, or of an undivided portion of the things pawned, will operate as an extinguishment only *pro tanto*.[4] If the pledgee yields up the possession of the pledge to the pledgor,[5] or consents that the latter shall alienate it, or pledge it to another person, either of these acts will amount to a waiver of his right to the pledge.[6]

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[1] Dig. Lib. 13, tit. 7, l. 18, § 3.

[2] Pothier, Pand. Lib. 20, tit. 6, n. 12, 13; 1 Domat, B. 3, tit. 1, § 7, art. 7; Ayliffe, Pand. B. 4, tit. 18, p. 536, 537.

[3] Taylor *v.* Plumer, 3 Maule & Selw. 562; Story on Agency, § 224, 229–231.

[4] Pothier, Pand. Lib. 2, tit. 6, § 4, l. 14; Macomber *v.* Parker, 14 Pick. R. 497, 507.

[5] Homes *v.* Crane, 2 Pick. R. 607; Runyan *v.* Mersereau, 11 Johns. R. 539; Ante, § 287, 299; Reeves *v.* Capper, 5 Bing. N. C. 136; Ryall *v.* Rolle, 1 Atk. 165.

[6] Pothier, Pand. Lib. 20, tit. 6, § 4, l. 21; 1 Domat, B. 3, tit. 1, § 7, art. 12, 13, 14; Ante, § 287, 289.

§ 365. These formal divisions of the modes of extinguishing the right to the pledge have been taken from the Roman law, in which they are set down with minute accuracy. The common law, however, is precisely the same as to all the principles which govern them, with the exceptions which have been incidentally suggested. Indeed, the whole doctrine of extinguishment is resolvable into the very first elements of justice, and is founded upon the express or implied intention of the parties to extinguish the pledge, or upon a virtual extinguishment by the necessary operation of law.

§ 366. It remains to take notice of a few peculiarities in the local jurisprudence of Massachusetts, upon the point now under consideration. It seems to have been held in one case, that, if a pawnee causes the goods which are pawned, to be attached in a personal suit against the pawnor for the very debt for which it is pledged, his lien or right to the pledge is waived or extinguished by such an attachment.[1] But this doctrine, if it is admitted to be fully settled, is to be restricted to the very case stated; for an attachment of the same property by the pawnee, for the security of other debts due to him by the pledgor, will not be a waiver or extinguishment of the lien or right of the pledgee to the pledge, if at the time of such attachment he gives notice to the officer, that he means also to insist on such lien and pledge, and he requires the officer to maintain the possession accordingly for him.[2] It seems, also, to have been held in another case, that the pledgee has no right, in any personal suit, to attach any other property of the pawnor for the debt, without first returning the pawn to him.[3] [But if this ever was the law in Massachusetts, it has long since been overruled.[4]] It is to be observed, that the common process, by

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[1] Swett *v.* Brown, 5 Pick. R. 178. But see Buck *v.* Ingersoll, 11 Met. 226. See also, Jacobs *v.* Latour, 5 Bing. R. 130; Hooker *v.* Olmstead, 6 Pick. R. 481; Story on Agency, § 367.

[2] Townsend *v.* Newell, 14 Pick. R. 332, 335; Whitaker *v.* Sumner, 60 Pick. R. 399, 406.

[3] Cleverly *v.* Brackett, 8 Mass. R. 150. [But see Taylor *v.* Cheever, 6 Gray, 146, in which Cleverly *v.* Brackett is overruled.]

[4] See Beckwith *v.* Sibley, 11 Pick. R. 482; Cornwall *v.* Gould, 4 Pick. 444; Whitwell *v.* Brigham, 19 Pick. R. 117; Buck *v.* Ingersoll, 11 Metc. 232; Taylor *v.* Cheever, 6 Gray, 146.

which personal suits are instituted in Massachusetts, is a writ of attachment, which authorizes an attachment of the property, or, if none can be found, an arrest of the person of the debtor, to answer the exigency of the writ. In order to make the process effectual, it is indispensable that there should be either an attachment of property (nominally at least), or an arrest of the person. The effect of these decisions, therefore, supposing them to be sustained to their full extent, may be, that the writ of attachment in all cases of pledge, will be but a writ of capias in favor of the creditor, and that, however inadequate the pledge may be as a security, he must abandon it before he can secure himself by any attachment of the property of his debtor. What would be the effect of a levy of the execution, which should issue upon a judgment in favor of the creditor for the debt, upon the pledge or other property of the debtor, does not appear to have been decided. Nor, indeed, does it appear to have been decided, what would be the effect of a personal suit brought by the creditor while he retains the pledge.

§ 367. The important head of Pawns or Pledges is thus brought to a conclusion. And, however minute some of the details and distinctions may appear to be, they are far from exhausting the subject. If the object of these Commentaries had not been rather to present a practical view of the leading principles, than to introduce nice discussions, there would not be wanting other materials to exercise the subtilty, as well as to employ the patience, of the inquisitive jurist.

CHAPTER VI.

CONTRACTS OF HIRE.

§ 368. THE fifth and last class of Bailments consists of bailments for hire. A contract of this sort is called in the Roman law *Locatio*, or *Locatio-Conductio*, both words being used pro-

miscuously to signify the same thing.[1] In the Roman law it may be defined thus: *Locatio-Conductio est contractus, quo de re fruendâ vel faciendâ pro certo pretio convenit.*[2] In other words, it is a contract, whereby the use of a thing, or the services and labor of a person are stipulated to be given for a certain reward.[3] Pothier defines it to be a contract, by which one of the contracting parties engages to allow the other to enjoy or use the thing hired, during the stipulated period, for a compensation which the other party engages to pay.[4] A definition, substantially the same, will be found in other writers.[5] Lord Holt has defined it to be, "when goods are left with the bailee to be used by him for hire."[6] The objection to this, as well as to the definition of Pothier, is, that it is incomplete, and covers only cases of the hire of a thing (*locatio rei*), and excludes all cases of the hire of labor and services, and of the carriage of goods. Mr. Bell defines it with great exactness, thus: "Location is in general defined to be a contract, by which the temporary use of a subject, or the work or service of a person, is given for an ascertained hire."[7] At the common law it may properly enough be defined to be a bailment of a personal chattel, where a compensation is to be given for the use of the thing, or for labor or services about it; or, in other words, it is a loan for hire, or a hiring or letting of goods, or of labor and services, for a reward.[8]

§ 369. We are accustomed, in the common law, to use

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[1] Ayliffe, Pand. B. 4, tit. 7, p. 460.

[2] This is the definition given by Pothier, in his edition of the Pandects, deduced from the Roman text, but not the text itself. Pothier, Pand. Lib. 19, tit. 2, n. 1; Inst. Lib. 3, tit. 25; Dig. Lib. 19, tit. 2, l. 1, 2; Heinecc. Pand. Lib. 19, tit. 2, § 307.

[3] Wood, Inst. B. 3, ch. 5, p. 235, 236; 1 Domat, B. 1, tit. 4, § 1, art. 1.

[4] Pothier, Contrat de Louage, n. 1.

[5] 1 Domat, B. 3, tit. 4, § 1, art. 1. See also, Code Civil of France, art. 1709, 1710.

[6] Coggs *v.* Bernard, 2 Ld. Raym. 909, 913.

[7] 1 Bell, Comm. § 198, 385, 4th edit.; 1 Bell, Comm. p. 255, 451, 5th edit.; 1 Bell, Comm. § 198, 385, 4th edit.

[8] 2 Kent, Comm. Lect. 40, p. 585, 4th edit.; 1 Bell, Comm. p. 255, 451, 5th edit.; 1 Bell, Comm. § 198, 385, 4th edit. See also, Monthly Law Magazine (London), for April, 6839, p. 217, 218, 219.

words corresponding to those of the Roman law, almost in the same promiscuous manner. Thus letting (*locatio*) and hiring (*conductio*) are precise equivalents, used for the purpose of distinguishing the relative situation of different parties to the same contract. The letter, called in the civil law *locator*, and in the French law *locateur*, *loueur*, or *bailleur*, is he who, being the owner of the thing, lets it out to another for hire or compensation; and the hirer, called in the civil law *conductor*, and in the French law *conducteur*, *preneur*, *locataire*, is he who pays the compensation, having the benefit of the use of the thing.[1] Both Heineccius and Sir William Jones have taken notice of the nicety in the use of the words *locator* and *conductor* in the Latin language. The employer, who gives the reward, is called *locator operis* (the letter of the work), but *conductor operarum* (the hirer of the labor and services); while the party employed, who receives the pay, is called *locator operarum* (the letter of the labor and services), but *conductor operis* (the hirer of the work).[2] The nicety, although not as much felt in the English language, is yet not a total stranger to it.[3]

§ 370. The contract of letting and hiring is usually divided into two kinds: — (1) *Locatio*, or *locatio-conductio rei*, the bailment or letting of a thing to be used by the bailee for a compensation to be paid by him. (2) *Locatio operis*, or the hire of the labor and services of the bailee for a compensation, to be paid by the bailor.[4] And this last kind is again subdivided

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[1] Wood, Inst. B. 3, ch. 5, p. 236; Pothier, Contrat de Louage, n. 1; 1 Domat, B. 1, tit. 4, § 1, art. 2; Heinecc. Pand. Lib. 19, tit. 2, § 318; Jones on Bailm. 90; Wood, Inst. Civ. Law, 236.

[2] Heinecc. Pand. Lib. 19, tit. 2, § 320, note; Jones on Bailm. 90, note (r); Pothier, Pand. Lib. 19, tit. 2, p. 2, n. 1, 15; Pothier, Contrat de Louage, n. 392.

[3] Mr. Gibbon, in common with many other writers, has complained of the poverty of our language in regard to terms expressive of some of the different classes of bailments, and especially of the difference between a *mutuum* and a *commodatum*. He has not hesitated to adopt the term "location," to signify the contract of hire. One might almost be tempted to follow him in this naturalization of the Roman word. Gibbon's Rome, vol. 8, ch. 44, p. 84. In the Scottish law, the letter is called the locator, and the hirer the conductor, and the contract of hire, location. 1 Stair, Inst. B. 1, tit. 15, § 1, 5, 6.

[4] Code Civil of France, art. 1709, 1710; Pothier, Contrat de Louage, Art. Prelim.; Merlin. Repert. art. *Louage*, art. *Bailment*.

into two classes; — (1) *Locatio operis faciendi*, or the hire of labor and work to be done, or care and attention to be bestowed, on the goods bailed by the bailee for a compensation; or, (2) *Locatio operis mercium vehendarum*, or the hire of the carriage of goods from one place to another for a compensation.[1] Each of these heads will be severally treated of in its order; and for the sake of brevity we shall often call the bailor the letter, and the bailee the hirer. Lord Holt has called the former the lender, and the latter the borrower.[2] But this language is equivocal, and may lead to some confusion, since it is usually appropriated to cases of gratuitous loans.

§ 370 *a*. There is another classification, made by Pothier and alluded to by Sir William Jones, in contracts of hire, and in which the former divides them into regular contracts of hire, and irregular contracts of hire. In the former case, the specific thing which is let to hire is to be returned; in the latter case, the specific thing is not to be returned, but a thing of a similar nature and value.[3] In this view the regular hiring corresponds to a regular deposit, and the irregular hiring to a *mutuum;* and the same distinction subsists between them. In the regular contract of hire, the proprietary interest in the thing let is not changed, but remains in the letter; in the irregular contract of hire, the proprietary interest in the thing is changed and passes to the hirer.[4] The same distinction was recognized in the Roman law. Thus, if cloths were let to a fuller to be dressed and to be returned, there the contract was deemed to be one of regular hire. On the other hand, if an ingot of silver was given to a smith, to be by him melted and wrought into vases, there it was a contract of irregular hire. *Rerum locatarum duo genera esse; ut aut idem redderetur, sicuti, quum vestimenta fulloni curanda locarentur; aut ejusdem generis redderetur, veluti, quum argentum pustulatum fabro*

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[1] Jones on Bailm. 85, 86, 90, 103; Id. 118; 2 Kent, Comm. Lect. 40, p. 585, 586, 4th edit.; Code Civil of France, art. 1709, 1710, 1711.

[2] Coggs *v.* Bernard, 2 Ld. Raym. 909, 913.

[3] Pothier, de Dépôt, n. 82; Jones on Bailm. 102; Ante, § 84.

[4] Pothier, de Dépôt, n. 84; Ante, § 84; Post, § 415 a; 2 Kent, Comm. Lect. 40, p. 588, 589, 4th edit.; Jones on Bailm. 102.

daretur, ut vasa fierent, aut aurum, ut annuli; ex superiore causâ rem domini manere; ex posteriori in creditum iri.[1] *Idem juris esse in deposito.*[2] This distinction is not formally acknowledged in the common law; although it may exist in practice, and give rise to different rights and responsibilities in the hirer.[3] Sir William Jones says, that, in the former case, it is a regular bailment; in the latter, it becomes a debt.[4] Perhaps the latter falls more properly, in the common law, under the head of the innominate contract, *Do ut facias.*[5]

§ 371. Before proceeding to the consideration of the different species of contracts of bailments for hire, it may be proper to state some things which are applicable to them all. Pothier (as well as other foreign jurists, who have treated the subject with systematic accuracy), has remarked, that it is a contract which arises from the principles of natural law; that it is voluntary and founded in consent; that it involves mutual and reciprocal obligations; and that it is for mutual benefit.[6] In some respects it bears a strong resemblance to the contract of sale (*emptio-venditio*); the principal difference between them being, that in cases of sale the owner parts with the whole proprietary interest in the thing; and in cases of hire, the owner parts with it only for a temporary use or purpose.[7]

§ 372. From what has been observed, it is obvious that several ingredients are of the essence of the contract. (1) There should be a thing *in esse* which may be the subject-matter of the contract. (2) It should be a thing capable of being let. (3) The bailee should have a right to use, enjoy, and possess

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[1] Dig. Lib. 19, tit. 2, l. 31; Pothier, Traité de Dépôt, n. 82; Ante, § 84; Jones on Bailm. 102; 2 Kent, Comm. Lect. 40, p. 589, 3d edit.; Post, § 415 a, 438, 439.

[2] Ibid.; Ante, § 84.

[3] Post, § 415 a, 438, 439; Jones on Bailm. 102, 103; Pothier, Traité de Dépôt, n. 83.

[4] Jones on Bailm. 102.

[5] Post, § 377.

[6] Pothier, Louage, n. 2; Wood, Civil Law, B. 3, ch. 5, p. 235, 236; Ayliffe, Pand. B. 4, tit. 7, p. 460; Pothier, Pand. Lib. 19, tit. 2, n. 2.

[7] Pothier, Louage, n. 2, 3, 4; Jones on Bailm. 86; Dig. Lib. 19, tit. 2, l. 1, 2; Pothier, Pand. Lib. 19, tit. 2, n. 2, 9, 10.

it, during the period for which it is let. (4) There should be a price for the hire. And (5) there should be a contract possessing a legal obligation between the parties. These are accordingly treated by Pothier as of the essence of a location, or contract of hire.[1] (1) The first requires scarcely any comment; for unless there is a thing *in esse*, to which the contract can attach, and which necessarily constitutes its basis, the parties have acted under a mistake, and ought not to be bound by the bargain. Thus, for instance, if the thing which is the intended subject of the contract has perished, as if a horse, the intended subject of the hire, is dead at the time when the contract is entered into, the contract becomes a nullity.[2]

§ 373. (2) As to what things may be let to hire. In the common law, when the bailment of a thing is spoken of, it is confined to personal or movable property;[3] although, in the Roman and Continental law, the corresponding expression is equally applicable to real estate or immovable property, and to incorporeal hereditaments.[4] There seems no difficulty, in the common law, in applying the contract of bailment for hire to choses in action and to written securities as well as to goods and chattels. Although the use of the former on hire is probably rare, the carriage of them is a very common business of bailees for hire. Nor is there any intrinsic difficulty in applying the term bailment to land and immovable property. But, wherever land or immovable property is the subject of the contract, it passes under another denomination, and embraces many different considerations. We never hear of the bailment of houses or farms, although we often hear of the demise, and lease, and renting of houses and lands.

§ 373 *a*. (3) The use and enjoyment of the thing by the bailee. The thing must not only be personal or movable prop-

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[1] Pothier, Louage, n. 6, 7, 9, 22, 27, 32, 42.

[2] Id. n. 7.

[3] Coggs *v.* Bernard, 2 Ld. Raym. 909, 913; Jones on Bailm. 89, 90; Ante, § 51.

[4] Pothier, Contrat de Louage, n. 9; 1 Domat, B. 1, tit. 4, § 1, art. 4, 9; Id. § 4; Code Civil of France, art. 1713; Ayliffe, Pand. B. 4, tit. 7, p. 464; 1 Bell, Comm. p. 451, 5th edit.; 1 Bell, Comm. § 385, 4th edit.

erty, but it must be let to the bailee for a certain time and for certain purposes, either expressed or implied; and there must be a right in the bailee to use the thing, or to have the possession or enjoyment of it for those purposes, during the contemplated period of the bailment.[1] It would be preposterous to suppose that the bailee would contract to pay a compensation for a thing, from which he could derive no use, benefit, or employment, and which he should hold by the precarious tenure of the mere will of the bailor. As to the nature or the time of the use or enjoyment of the thing, it may be expressed, or it may be implied from circumstances.[2] Whether it is expressed or implied, the same legal result takes place.[3] The bailee must not exceed the proper use or enjoyment of the thing, either in time, or mode, or extent.[4] If he does, he will become responsible for the tortious conversion of the property, and generally for all losses consequent thereon, or subsequent thereto.[5]

§ 374. (4) As to the price or recompense. This, also, is of the essence of the contract, for if no hire is to be paid, it becomes a gratuitous loan.[6] *Pretium autem constitui oportet, nam nulla emptio sine pretio esse potest*, is the language of the Institutes in cases of sale;[7] and the same rule applies to bailments for hire.[8] According to the Roman and foreign law, the price must not be merely nominal, but must be intended to be a substantive compensation.[9] It must be certain and determinate, or be capable of certainty and estimation, in contradistinction to being contingent and conditional in its na-

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[1] Pothier, Contrat de Louage, n. 22, 23, 27, 31; Pothier, Pand. Lib. 19, tit. 2, n. 4; Post, § 395, 396, 397.

[2] Pothier, Contrat de Louage, n. 22, 23, 27, 28, 31.

[3] Ibid.

[4] Ibid.

[5] Post, § 413; Pothier, Contrat de Louage, n. 22, 23; Ante, § 232, 233, 241; Post, § 396, 412, 413.

[6] Pothier, Contrat de Louage, n. 32, 33, 34, 35; Just. Inst. Lib. 3, tit. 25; Pothier, Pand. Lib. 19, tit. 2, n. 4, 5, 6.

[7] Just. Inst. B. 3, tit. 24, § 1.

[8] Pothier, Contrat de Louage, n. 37; De Vente, n. 23, 24, 25.

[9] Ibid.; Pothier, de Vente, n. 16 to 19.

ture. As, if the contract is to pay such price as A shall decide, it will be a good contract of hire, if A fixes the price; but if A is dead, or he refuses to name any price, the contract will be void.[1] But, in cases of this sort, Pothier thinks that it would be more just to interpret the intention of the parties to be, that, at all events, a reasonable compensation should be made; and if it could not be ascertained in the manner prescribed, that it should be ascertained by other persons. Indeed, in many cases, this would be not only a natural, but almost a necessary interpretation of the real intention of the parties. He thinks that this interpretation ought especially to be adopted, if, when the person designated to fix the price has refused to do it, or is dead before he has fixed it, the hirer has already been put in possession of the thing hired, or the time for possessing and using it is so near and pressing, that delay would be injurious.[2] The common law would probably adopt a similar interpretation, and hold the real intention of the parties to be, that the price should be named by the third person, if he could or would; otherwise, that a reasonable price should be paid for the hire.[3]

§ 375. It is not necessary, that a specific price should be expressly agreed on; for it may be tacitly implied. When the labor is to be performed by an artisan, if no express price is agreed on, he is tacitly presumed to engage for the usual price paid for the like service at the same place, according to the general custom of the trade; or, which is the same thing, to pay what they are fairly worth there, according to the maxim, "*Id certum est, quod certum reddi potest.*"[4] So, in cases of hiring the use of a thing, the customary price is, in the absence of all positive engagements, presumed to be that which is agreed to be given; and if no price is fixed by custom, then a reasonable price is to be allowed.

§ 376. According to the Roman and foreign law, the price

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[1] Pothier, Contrat de Louage, n. 37; Pothier, de Vente, n. 23, 24, 25; Pothier, Pand. Lib. 19, tit. 2, n. 5; Long on Sales, by Rand, p. 5, edit. 1839.

[2] Pothier, Contrat de Louage, n. 37.

[3] See the reasoning of Pothier, Contrat de Louage, n. 37.

[4] Pothier, Contrat de Louage, n. 40; Id. de Vente, n. 23, 26.

ought to be payable in money; for, if it is not payable in money, but in some other manner, as by a delivery of goods, or by labor and services, or by the hire of another thing, it is not strictly a *locatio-conductio*, but it passes into another class of contracts, that of innominate contracts.[1] However, this distinction was not a very important consideration, even in the Roman law; for the innominate contract was equipollent, and was governed by the same rules and obligations as a *locatio-conductio*.[2]

§ 377. Sir William Jones, whose close adherence to the Roman law marks every page of his treatise, has, in one place, confined his definition of letting to hire to cases where a pecuniary compensation is given.[3] In another place, he speaks of the contract being for a stipend or price;[4] and he classes all other cases as innominate contracts.[5] But there seems no reason for any such distinction in the common law; since no difference, either in responsibility or in remedy, exists between cases of a pecuniary payment and cases of any other sort of recompense.[6] They are all treated indiscriminately as cases of bailment for hire.[7] Lord Holt's definition[8] suggests nothing as to the hire being pecuniary. Sir William Jones himself admits, that a pecuniary recompense is not indispensable, and says: "Although a stipend or reward in money be of the essence of the contract called *locatio*, yet the same responsibility for neglect is justly demanded in any of the innominate

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[1] Pothier, Contrat de Louage, n. 38; 1 Stair, Inst. B. 1, tit. 15, § 1.

[2] Pothier, Contrat de Louage, n. 38; Id. Appx. Contrat. de Louage, n. 458, 491; Inst. Lib. 3, tit. 25, § 2; Pothier, Pand. Lib. 19, tit. 2, n. 5.

[3] Jones on Bailm. 118.

[4] Jones on Bailm. 86.

[5] Jones on Bailm. 93; 2 Black. Comm. 444; Halifax, Analysis of Civil Law, 62.

[6] Jones on Bailm. 93.

[7] Mr. Chancellor Kent has adopted the same view of the subject in the last edition of his Commentaries. He there defines a location of hiring for a reward to be a "bailment, where a compensation is given (not saying pecuniary) for the use of a thing, or for labor and services about it." 2 Kent, Comm. Lect. 40, p. 595, 4th edit.

[8] Coggs *v.* Bernard, 2 Ld. Raym. 909, 913.

contracts, or whenever a valuable consideration of any kind is given or stipulated."[1] He proceeds to illustrate the position in various instances. Thus the innominate contract of the Roman law, *Do ut des*, is formed by a reciprocal contract for use. As if A permits B to use his pleasure-boat for a day, in consideration that B will permit him to use his chariot for the same time, this is the case of a double or reciprocal bailment for use on hire.[2] So, if a gives a pair of pointers to B, for the use of B's hunter during the season, it is a grant of the absolute property on one side, for the temporary bailment of property for use on the other side.[3] These cases belong to the class of innominate contracts of the civil law, *Do ut des*.[4] The same rule applies to the innominate contract, *Facio ut facias;* where two persons agree to perform reciprocal works. As if a mason and a carpenter have each respectively undertaken to build an edifice, and they mutually agree that the first shall finish all the masonry, and the second all the wood-work in their respective building, this would be the innominate contract, *Facio ut facias*.[5] A more simple case of the same sort is, where A, a cabinet-maker, agrees to repair B's sideboard, if B, who is a carrier, will carry A's bureau to Boston. This is a case of a double or reciprocal bailment, *operis faciendi*. Similar illustrations may be given of the other innominate contracts, *Do ut facias*, and *Facio ut des*. Thus, if a goldsmith should make a bargain with an architect to give him a quantity of wrought plate for building his house, this is a case of the reciprocal contract, *Do ut facias* or *Facias ut des*.[6] All these, then, being strictly cases of bailments for hire at the common law, and governed by similar obligations, without any of the set forms of remedy known to the Roman law, it seems, at best, but useless to retain distinctions borrowed from that law, which involve no real differences of principle, and may embarrass without instructing us.

§ 378. (5) As to the legal obligation of the contract. To produce this result it is necessary, (1) That the bailment should

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[1] Jones on Bailm. 93.
[2] Jones on Bailm. 93. [3] Ibid. [4] Ibid. [5] Ibid. [6] Ibid.

not be prohibited by law; (2) That it should be between persons competent to contract; and (3) That there should be a free and voluntary consent between the parties.

§ 379. (1) Certain bailments are prohibited by law, either from their being repugnant to sound morals, or their being against public policy, or their being positively forbidden. A bailment of furniture to be used in a brothel is an example of the first kind; a bailment of goods for the purpose of supplying a public enemy is one of the second kind; and a bailment of goods for the purpose of smuggling is one of the third kind.[1] The case of a locksmith, who should lend tools and instruments to thieves, to enable them to open the doors of houses, in order to steal goods therefrom, would seem to be prohibited, and void upon all these grounds;[2] the act being equally against morals, public policy, and law. Pothier has put a question: How far the letting of masks and dresses for masquerades and balls is a matter of a valid civil contract, seeing that, by the severe maxims of the Gospel, these amusements are not permitted. He thinks, that, as the use for which these things are hired is not prohibited by the secular law, the bailment will have an obligatory force in the secular forum; but that in the forum of conscience such a letting to hire must be treated as a dishonest traffic, by which the parties ought not to profit; and that the church cannot be expected to absolve them, unless they promise to renounce the traffic, and to devote the profits to purposes of charity.[3]

§ 380. (2) The parties must be competent to contract. In this respect, the general principles of the common law, as to the incapacity of contracting parties, apply to this, in common with other contracts.[4] Thus, married women, idiots, lunatics, and persons *non compotes mentis*, by reason of age, infirmity, or sickness, are unable to contract. Minors, also, are incapable of contracting, unless the contract is clearly for their benefit. Where a minor carries on trade, work done for him in

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[1] Pothier, Contrat de Louage, n. 24, 25, 26.

[2] Pothier, Contrat de Louage, n. 24.

[3] Pothier, Contrat de Louage, n. 26.

[4] Pothier, Contrat de Louage, n. 42, 46.

the course of his trade is not, ordinarily, the subject of an action against him; for the law will not suffer him to engage in trade.[1] And the party is not permitted, by bringing an action *in tort* against a minor, which is founded on a contract with him, to charge him, if he would not otherwise be liable. Therefore, if a minor hires a horse, and rides him immoderately, he is not responsible in an action laying the grievance *in tort*, as he would not be, if it were an action of assumpsit brought upon the contract.[2] It would, however, be otherwise, if the minor should ride the horse beyond the place agreed on; for in such a case he would exceed the limits of his contract, and be guilty of a tort, for which trover would lie.[3]

§ 381. (3) There must be a free and voluntary consent. But upon this we need not enlarge. If there is any substantial mistake between the parties, as to the thing to be hired, or the price to be paid, or as to the use to be had of it, or the act to be done upon it; or if there is any fraud or imposition, or any concealment, injurious to either party; in all such cases, the contract has not any legal obligation.[4]

§ 382. The next consideration is, as to the rights, duties, and obligations of the parties, resulting from the contract of bailment for hire. And here the subject may, for convenience, be naturally divided into several classes. (1) The hire of things; (2) The hire of labor and services in regard to things; (3) The hire of the custody of things; (4) The hire of the carriage of things; (5) Excepted and special cases. Of each of these we shall treat in its order.

ART. I. HIRE OF THINGS.

§ 383. First. In cases of Locatio Rei, or the hiring of a thing. What are the rights and duties of the letter to hire

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[1] Dilk *v.* Keighley, 2 Esp. R. 480; Green *v.* Greenbank, 2 Marsh. R. 485.

[2] Jennings *v.* Rundall, 8 Term R. 335. See Homer *v.* Thwing, 3 Pick. R. 492; Post, § 396, 413.

[3] Homer *v.* Thwing, 3 Pick. R. 492; Wheelock *v.* Wheelwright, 5 Mass. R. 104; Post, § 396, 413.

[4] Pothier, Contrat de Louage, n. 48 to 52; Pothier, Pand. Lib. 19, tit. 2, n. 7.

(*locator rei*). According to the foreign and Roman law, the letter, in virtue of the contract, impliedly engages to allow to the hirer the full use and enjoyment of the thing hired, and to fulfil all his own engagements and trusts in respect to it, according to the original intention of the parties: *Præstare, frui licere, uti licere.*[1] This implies an obligation to deliver the thing to the hirer; to refrain from every obstruction to the use of it by the hirer during the period of the bailment; to do no act, which shall deprive the hirer of the thing; to warrant the title and right of possession to the hirer, in order to enable him to use the thing, or to perform the service; to keep the thing in suitable order and repair for the purposes of the bailment; and, finally, to warrant the thing free from any fault, inconsistent with the proper use or enjoyment of it. These are the main obligations deduced by Pothier from the nature of the contract; and they seem generally founded in unexceptionable reasoning.[2]

§ 384. (1) The delivery of the thing, being essential to the bailment, must be made by the hirer, unless otherwise agreed. It should be with its proper accompaniments; as, if a horse is let to ride, it should also be with a suitable saddle and bridle; and the delivery should be at the expense of the letter, and at the place where the thing is, and at the time specified.[3] However, these things are generally regulated by the customs and usages of business at the place where the hiring takes effect, which are thus silently adopted into the contract. *In contractibus tacite veniunt ea, quæ sunt moris et consuetudinis.*[4]

§ 384 *a*. In cases of non-delivery of the thing by the letter, whether it arises from his mere refusal, or from his subsequent sale or transfer thereof to another person, or from his having

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[1] Post, § 387; Pothier, Contrat de Louage, n. 53, 54.

[2] Pothier, Contrat de Louage, n. 53; Id. n. 277; 1 Domat, B. 1, tit. 4, § 3, art. 1; Pothier, Pand. Lib. 19, tit. 2, p. 2, n. 42 to 73; Code Civil of France, art. 1718; Heinecc. Pand. Lib. 19, tit. 2, § 324; 1 Bell, Comm. p. 452, 5th edit.; 1 Bell, Comm. § 385 to 389, 4th edit.; 1 Stair, Inst. B. 1, tit. 15, § 6.

[3] Pothier, Contrat de Louage, n. 54 to 58.

[4] Pothier, Contrat de Louage, n. 57, 58; 1 Domat, B. 1, tit. 4, § 3, art. 1; Dig. Lib. 19, tit. 2, l. 15, § 1; Code Civil of France, art. 1720.

stipulated for the delivery of a thing, of which he is not the owner, and over which he has not any control, a right of action accrues to the hirer.[1] But by the French law, if the non-delivery is prevented by inevitable casualty, or superior force, as if it perishes, no such action lies; for in that law the rule is: *Impossibilium nulla obligatio est.*[2] But in all these cases the hirer may, if he chooses, treat the contract as rescinded; and if he has paid any consideration therefor, he may recover it back.[3] On the other hand, if the letter offers to deliver the thing in an injured or broken or altered state, from what it was at the time of the hiring, the hirer is not bound to receive it; but he is entitled to insist upon rescinding the contract.[4] And in such a case, it will make no difference whether the injury or deterioration was by inevitable accident, or by any other cause.[5]

§ 385. (2) The refraining from every obstruction of the hirer in the use of the thing, or in performing his own engagements respecting it. This results from the first principles of justice.[6] The only point of a practical nature worth consideration is, what amounts to an obstruction. If a chattel is let, the resumption of the possession by the letter is a clear case of violation of duty. But whenever the letter is impliedly bound to keep it in repair during the time of the bailment, he may for a temporary purpose of this sort, if necessary, resume the possession. Thus, if a coach is let for a month, and it requires repairs, the owner may take possession of it for such a time as is necessary to complete the repairs; but he must then return it.[7]

§ 386. (3) The like remark applies to the doing of any act, which will deprive the hirer of the thing. As, if the letter sells the thing bailed, or suffers it to be rightfully at-

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[1] Pothier, Contrat de Louage, n. 64, 65, 66, 71.

[2] Pothier, Contrat de Louage, n. 65, 73.

[3] Pothier, Contrat de Louage, n. 67, 73, 74.

[4] Pothier, Contrat de Louage, n. 74.

[5] Pothier, Contrat de Louage, n. 74.

[6] Pothier, Contrat de Louage, n. 75 to 105; 2 Kent, Comm. Lect. 40, p. 586, 4th edit.

[7] Pothier, Contrat de Louage, n. 77, 106; Dig. Lib. 19, tit. 2, n. 15, 25; 1 Domat, B. 1, tit. 4, § 3, art. 1, 7; Code Civil of France, art. 1719, 1725.

tached, so that the hirer is thereby deprived of the use of it. In such cases, there is a clear violation of his implied obligation.[1]

§ 387. (4) The implied warranty of the title and right of possession to the hirer. The rule here is: *Ut præstet conductori frui licere, uti licere.*[2] This of course applies only against the legal claims of third persons to disturb the enjoyment and use of the thing; for tortious acts on their part furnish no just foundation in our law for a remedy over against the letter; much less do torts occasioned by the default of the hirer himself. For the wrongful acts of a third person, the hirer has a remedy against him;[3] and, of course, for his own wrongful acts he ought to have no remedy whatsoever.[4]

§ 388. (5) The obligation of the letter to keep the thing in suitable order and repair for the purposes of the bailment.[5] This is considered by Pothier as an obligation arising by operation of law from the fact, that the enjoyment or use, contemplated by the contract, cannot otherwise be obtained. Thus, if a loom is let to hire for a number of years, the letter is bound to keep it in suitable repair during the whole period, unless the necessity of repairs arises from the fault of the hirer.[6] But, however correct this may be as a general principle, it is affected by all the contrary implications which may arise from the usages of trade, and the customs of the place, as well as from

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[1] Pothier, Contrat de Louage, n. 86, 87; 1 Domat, B. 1, tit. 4, § 3, art. 4; Dig. Lib. 19, tit. 2, l. 25; 1 Bell, Comm. p. 452, 5th edit.; 1 Bell, Comm. § 385 to 389, 4th edit.

[2] Ante, § 383; Pothier, Contrat de Louage, n. 53, 54, 83.

[3] Pothier, Contrat de Louage, n. 81 to 89; 1 Domat, B. 1, tit. 4, § 3, art. 2; Dig. Lib. 19, tit. 2, l. 9; Code Civil of France, art. 1719, 1725, 1726, 1727.

[4] Ante, § 94, 150, 152, 280, 352; Post, § 394.

[5] Pothier, Contrat de Louage, n. 129, 130; 1 Domat, B. 1, tit. 4, § 4, art. 1, 6, 7; Pothier, Pand. Lib. 17, tit. 2; 1 Bell, Comm. § 388, 4th edit.; 1 Bell, Comm. p. 453, 5th edit.; 2 Kent, Comm. Lect. 40, p. 586, 4th edit.; Code Civil of France, art. 1719, 1720, is to the same effect; and so is the Code of Louisiana of 1825, art. 2662, 2663, 2664; Harrington *v.* Snyder, 3 Barbour, Supreme Ct. (N. Y.), R. 380.

[6] Pothier, Contrat de Louage, n. 106, 129, 130, 219, 325; 1 Domat, B. 1, tit. 4, § 3, art. 1, 7; Id. § 2, art. 9, 14; Dig. Lib. 19, tit. 2, l. 25, § 2; Code Civil of France, art. 1769, 1724, 1725.

any positive contract between the parties.[1] Thus, says Pothier, when a horse is let to one on hire, to be kept by him for a certain period, the hirer is understood to be bound, according to the common usage, to pay for his shoeing during that time.[2] But it is otherwise, if a person lets his coach and horses to another for a journey, to be driven by the servants of the letter; for, in such a case, the horses are under the care of the servants, and the letter is to pay for their shoeing.[3] Pothier's language, even in the former case, ought probably to be understood with this qualification, that the horse was sufficiently well shod for the journey at the commencement thereof; and that, by accident or unexpected circumstances, the shoes become insufficient, or are lost or knocked off in the course of the journey.

§ 389. In respect, however, to extraordinary expenses necessarily incurred upon the thing, the foreign law obliges the letter to pay them to the hirer.[4] Thus, if a hired horse is taken sick on the journey agreed on, without the fault of the hirer, the expenses which are *bonâ fide* incurred for his medicines, nourishment, and cure, during his sickness, are to be borne by the letter, whether the horse recovers or dies with the malady.[5] But the letter is never liable for expenses which are not necessarily incurred, although they may be useful.[6] Mr. Bell says, that in the Scottish law, to ground a claim for expenses, it is necessary to show, (1) that the occasion of the expense was not ascribable to the hirer; (2) that the expense was indispensably necessary; (3) that the letter had due notice of the facts from the hirer, as soon as circumstances permitted.[7] Pothier considers that notice, though ordinarily proper, will not, if

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[1] Pothier, Contrat de Louage, n. 107, 132.

[2] Pothier, Contrat de Louage, n. 107.

[3] Pothier, Contrat de Louage, n. 107, 129, 196; Post, § 403.

[4] 2 Kent, Comm. Lect. 40, p. 586, 4th edit. See Reading *v.* Menham, 1 Mood. & Rob. 234.

[5] Pothier, Contrat de Louage, n. 129; 1 Stair, Inst. B. 1, tit. 15, § 6.

[6] Pothier, Contrat de Louage, n. 131.

[7] 1 Bell, Comm. p. 453, 5th edit.; 1 Bell, Comm. § 388, 4th edit.; Ersk. Inst. B. 3, tit. 1, § 23.

omitted to be given, exclude the hirer from the right to recover his expenses, if the disease was certain, and continued, and was without the fault of the hirer, and if the expenses were indispensable.[1]

§ 390. (6) The obligation of warranty by the letter against faults and defects, which prevent the due enjoyment or use of the thing. In respect to this point, the rule of the foreign law is, that the warranty extends to all faults and defects, which go to the total prevention of the use or enjoyment of the thing; but not to those which render the use or enjoyment less convenient.[2] Thus, if a horse is let, which is wholly unfit to perform the journey from his vices or defects, as from disease or blindness, it goes to the very foundation of the bailment, and the warranty attaches upon it.[3] It will be otherwise, if he has some slight vices or defects only, such as being a little restive, or being a little inclined to start, or being not quite sure-footed; these vices and defects do not ordinarily come within the reach of the warranty.[4] However, if these vices and defects are of a much higher degree, as if the horse be very restive, or very apt to start, or to run away, or be constantly stumbling, so that the owner knows that there is great danger and risk in riding him, and the owner conceals them from the hirer, he will, as we shall presently see, be responsible for all injuries to the hirer, either on account of his warranty, or of his fraud.[5] The warranty extends not only to vices and defects which are known to the letter, but also to those which are unknown; to those which exist at the time of the contract, and to those which supervene afterwards; to those which exist in the accessory, as well as to those which exist in the principal.[6] Where the vice or defect is known to the letter, he is

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[1] Pothier, Contrat de Louage, n. 129.

[2] Pothier, Contrat de Louage, n. 110; Code Civil of France, art. 1721; Code of Louisiana (1825), art. 2665.

[3] Pothier, Contrat de Louage, n. 110, 114; Code Civil of France, art. 1721.

[4] Pothier, Contrat de Louage, n. 110, 114; Dig. Lib. 19, tit. 2, l. 19, 45; Code Civil of France, art. 1721.

[5] Post, § 391 a; Pothier, Contrat de Louage, n. 110, 114, 122.

[6] Pothier, Contrat de Louage, n. 111, 112, 113, 115; Code Civil of France, art. 1719, 1721.

liable for all damages on account of the deceit. But where it is unknown to him, it goes simply in discharge of the contract, so that he is not entitled to the hire.[1]

§ 390 *a*. Pothier, under this head, puts the case of an artisan, who lets things to hire in the course of his trade or business; and in respect to which he holds him bound to be informed of all the defects of the things let, and therefore responsible for those defects, whether in point of fact he knew them or not. Thus, says he, if I have hired of a cooper vessels to put my wine in at the vintage, and the vessels are made of bad wood, the cooper will be liable to all losses sustained by me by the defects of those vessels; and his ignorance of the defects will furnish no excuse; for his trade required him to examine into the wood which he used, and to use that which was of good quality. In short, he warrants reasonable skill. *Imperitia culpæ annumeratur.*[2] Such also is the Roman law. *Si quis dolia vitiosa ignarus locaveret, deinde vinum effluxerit, tenebitur in id, quod interest; nec ignorantia ejus erit excusata.*[3] So, Pothier holds that if he was not a cooper, but a mere letter, or dealer, or trader in such articles, he would in like manner be responsible for all such losses, because he ought to understand the nature and qualities of the things in which he deals, and which he lets to hire, and he has no business to intermeddle with what he does not understand.[4]

§ 391. Besides these, there are other implied obligations in the Roman law. Such are the duties of disclosing the faults of the thing hired, and practising no artful concealment; of charging only a reasonable price therefor; and of indemnifying the hirer for all expenses, which are properly payable by the letter.[5] These, although enlarged upon by Pothier, seem to require but a brief notice, as they are almost self-evident.

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[1] Pothier, Contrat de Louage, n. 118, 119, 120; 1 Domat, B. 1, tit. 4, § 3, art. 8, 10.

[2] Pothier, Contrat de Louage, n. 119.

[3] Dig. Lib. 19, tit. 2, l. 19, § 1; Pothier, Pand. Lib. 19, tit. 2, n. 63; Id. n. 35.

[4] Pothier, Contrat de Louage, n. 119; Id. 110.

[5] Pothier, Contrat de Louage, n. 106, 109, 121, 129, 130; 1 Domat, B. 1,

§ 391 *a*. In the first place, as to the disclosure of the faults of the thing hired. This obligation supposes that the non-disclosure or concealment of the faults tends materially to diminish the proper use of the thing hired, or to expose the hirer to uncommon perils, by which he may be essentially injured. Thus, for example, if I hire a horse of the owner, which he knows is very skittish and timid, and very apt to start or run away, so that it is very dangerous to ride him, and he does not inform me of these defects, but studiously conceals them, and I am thereby thrown from the horse, and injured, the owner will be responsible to me for the damages.[1] It is not, indeed, perhaps quite clear, whether Pothier maintains this duty to be a legal duty in all cases, or only *in foro conscientiæ*;[2] but it seems clear upon general principles, that the owner would be responsible at law for all the damages.

§ 391 *b*. In the next place, as to the price. If no fixed price is agreed on, then a reasonable price is to be allowed for the hire, which reasonable price is usually ascertained by the customary price at the place where the contract takes effect. If there is a fixed price agreed on, that is the price which the hirer ought to pay, unless it be of such an extortionate character, that it properly gives rise to the imputation of fraud, or imposition, or gross and unconscionable advantage taken of the hirer's situation. The most that, in common justice, or *in foro conscientiæ*, can be demanded, is *apex justi pretii*, as Pothier terms it; but the law requires other circumstances to justify a reduction, such as fraud or imposition, or gross and unconscionable advantage taken of the party.[3]

§ 391 *c*. In the next place, as to the duty of the letter to reimburse all the necessary and extraordinary expenses incurred by the borrower about the thing hired. This point has been

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tit. 4, § 4, art. 1, 6, 7, 10; Dig. Lib. 19, tit. 2, l. 15, § 1; Id. l. 55, § 1; Pothier, Pand. Lib. 17, tit. 2, n. 42, 61.

[1] Pothier, Contrat de Louage, n. 122, 124.

[2] Pothier, Contrat de Louage, n. 122; Id. 110, 114.

[3] Pothier, Contrat de Louage, n. 125, 126, 127; 1 Story on Eq. Jurisp. § 244, 245, 246.

already sufficiently considered.[1] It seems hardly necessary to say, that, if these expenses are properly chargeable to the letter, his duty to pay them is complete and perfect at law.

§ 392. Such are some of the more important obligations, recognized in the Roman and foreign law on the part of the letter. It is difficult to say (reasonable as they are in a general sense) what is the exact extent to which they are recognized in the common law. In some respects the common law certainly differs, and in others it probably agrees. The Roman law, and the foreign law, treat leases of real estate as bailments on hire, and, indeed, emphatically as such bailments;[2] and the owner or lessor, and not the tenant, is, in the absence of all other stipulations or customs to the contrary, bound to keep the estate in repair.[3] The common law is different in such cases; for the landlord, without an express agreement, is not bound to repair; and the tenant may and ought to make the necessary repairs at his own expense.[4] Lord Mansfield,[5] on one occasion, said, that by the common law he who has the use of a thing ought to repair it. It is true, that the remark was applied to the case of a grant of a way which was out of repair; but the remark was general. Lord Hale is also reported to have said, that if plate is let, and it is worn out in the service, the hirer is not liable to any action, unless he has been guilty of some default.[6] It has also been decided, that

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[1] Ante, § 388, 389; 1 Domat, B. 1, tit. 4, § 4, art. 1, 6, 7; Pothier, Contrat de Louage, n. 106, 129, 130, 202; 1 Bell, Comm. § 388, 4th edit.; 1 Bell, Comm. p. 453, 5th edit.; 2 Kent, Comm. Lect. 40, p. 586, 4th edit.

[2] Jones on Bailm. 90.

[3] Pothier, Contrat de Louage, n. 106, 129, 130, 133, 219; 1 Domat, B. 1, tit. 4, § 4, art. 1, 6, 7; Code Civil of France, art. 1720 to 1740; Code of Louisiana (1825), art. 2664 to 2680. There are certain slight repairs (légères réparations), which in France are to be borne by the hirer. They are called *Locatives*. Pothier, Contrat de Louage, n. 106, 129, 130, 219, 220.

[4] Pomfret *v.* Ricroft, 1 Saund. R. 321, 322, Williams's note; Id. 323, n. 7; Countess of Shrewsbury's case, 5 Rep. 14; Ferguson *v.* ———, 2 Esp. R. 590; Horsefall *v.* Mather, Holt's N. P. R. 7; Walton *v.* Waterhouse, 2 Saund. R. 422, Williams's note, 2; Fowler *v.* Bott, 6 Mass. R. 63.

[5] Taylor *v.* Whitehead, 2 Doug. R. 745, 748.

[6] Pomfret *v.* Ricroft, 1 Saund. R. 321, 323, and n. 7.

tenants are bound to repair fences during their occupancy.[1] In the absence of any direct authority upon the other points above stated from the foreign law, they must be propounded as still open to controversy in our law. Cases may easily be put of a practical nature, and of frequent recurrence. Suppose a coach is hired for a journey, and it is injured, and requires repairs, without any fault of the hirer, during the journey; who is to bear the expense of these repairs? If the repairs are very great, and are permanently beneficial to the owner, are they to be borne exclusively by the owner, or by the hirer, or jointly by both in proportion to the benefit received by each? A tenant is not obliged to make any permanent or general repairs.[2] Is a like rule applicable to chattels? Suppose a ship, let to hire for a voyage, shall from accidents require repairs, and the contract contains no clause relative to repairs; are they to be paid for ultimately by the hirer, or by the owner? Is there a difference between temporary and permanent repairs; between slight and beneficial repairs; between such as merely make good the old work, and such as increase the value of the ship? These questions are put; but they cannot be satisfactorily answered, until they shall have undergone a judicial determination.[3]

§ 393. In respect to animals hired, the common understanding is, that the hirer is bound to provide them with suitable food during the time of such hiring, unless there is some agreement to the contrary.[4] This also is the rule of the French law;[5] and probably also of the other nations which derive their jurisprudence from the Roman law. [Hirers of slaves are generally bound to furnish them with suitable medical attendance during the bailment.[6]]

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[1] Cheetham *v.* Hampson, 4 T. R. 318.

[2] Ferguson *v.* ———, 2 Esp. R. 590; Horsefall *v.* Mather, Holt, N. P. R. 7.

[3] See 2 Kent, Comm. Lect. 40, p. 586, 4th edit.; Reading *v.* Menham, 1 Mood. & Rob. 234.

[4] Handford *v.* Palmer, 2 Brod. & Bing. 359; s. c. 5 Moore, R. 74; Ante, § 388, 389, 399.

[5] Pothier, Contrat de Louage, n. 107, 129.

[6] Brooks *v.* Cook, 20 Geo. 87; Latimer *v.* Alexander, 14 Geo. 259; Hay-

§ 394. As to the rights and duties of the hirer. First. As to his rights. By the Roman law the hirer acquired the right of possession only of the thing for the particular period or purpose stipulated; but he acquired no property in the thing. *Non solet locatio dominium mutare*, says Ulpian, in the Digest.[1] This also is the rule of the Scottish law; and probably also of the Continental nations of Europe, who derive their jurisprudence from the Roman law.[2] By the common law, in virtue of the bailment the hirer acquires a special property in the thing during the continuance of the contract, and for the purposes expressed or implied by it.[3] Hence he may maintain an action for any tortious dispossession of it, or any injury to it, during the existence of his right.[4] [And on the same principle an auctioneer who, as agent of the owner, sells and delivers goods on a condition which is not complied with, may maintain replevin therefor against the purchaser.[5]] But since, in such case, the owner has also a general property, unless he has, by virtue of his agreement, parted with it for a term, he also may maintain a like suit against the stranger.[6] But in such a case

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wood *v.* Long, 5 Iredell, 438; Wells *v.* Kennedy, 4 McCord, 182; Meeker *v.* Childress, Minor, 109; Gibson *v.* Andrews, 4 Ala. 766.

[1] Dig. Lib. 19, tit. 2, l. 39; Pothier, Pand. Lib. 19, tit. 2, n. 10.

[2] 1 Bell, Comm. § 198, 4th edit.; 1 Bell, Comm. p. 255, 5th edit. and note, ibid.; Bynk. Obs. Jurisp. Rom. Lib. 8, Cap. 4, and Cujaccii Oper. Lib. 8, Obs. Cap. 39. See Code Civil of France, art. 1709; Code of Louisiana (1825), art. 2644; Pothier, Contrat de Louage, n. 3, 4, 5, 22.

[3] Jones on Bailm. 85, 86; Bac. Abr. *Bailment*, C.; Lee *v.* Atkinson, Yelv. 172; 2 Black. Comm. 395, 396; 2 Kent, Comm. Lect. 40, p. 586, 4th edit.; 2 Saund. R. 47, and note by Williams; Eaton *v.* Lynde, 15 Mass. R. 242; Post, § 422 a.

[4] Croft *v.* Alison, 4 Barn. & Ald. 590; 2 Saund. R. 47; Id. 48 e; Bac. Abr. *Trespass*, C.; Id. *Trover*, C.; Ludden *v.* Leavitt, 9 Mass. R. 104; Warren *v.* Leland, Id. 265; Hall *v.* Pickard, 3 Camp. R. 187; Ante, § 93 to 95, 150, 152, 280; Nicolls *v.* Bastard, 2 Cromp. Mees. & Rosc. 659, 660.

[5] Tyler *v.* Freeman, 3 Cush. 261.

[6] Bac. Abr. *Trespass*, C.; Id. *Trover*, C.; 2 Black. Comm. 396; Gordon *v.* Harper, 7 Term R. 9; Pain *v.* Whittaker, 1 R. & Mood. 99; 2 Saund. R. 47, notes by Williams, &c.; 2 Black. Comm. 396; Ante, § 94, 95, 150, 152, 280; Lacoste *v.* Pipkin, 13 Sm. & Mar. 589; Nicolls *v.* Bastard, 2 Cromp. Mees. & Rosc. 659.

a recovery by either, it seems, will bar, or at least may bar, the action of the other.[1]

§ 395. The hirer also acquires the right, and the exclusive right to the use of the thing during the time of the bailment; and the owner has no right to disturb him in the lawful enjoyment of it during this time;[2] [nor can a creditor of the bailor attach the property, and take it from the custody of the bailee.[3] And if, during that time, the thing is redelivered to the owner for a temporary purpose only, he is bound to deliver it back afterwards to the hirer.[4]

§ 396. But the question may be asked, whether the hirer acquires such a right to the use of the thing, during the time of the bailment, that the owner is bound to abstain from interfering with his enjoyment of it during that time, although the hirer should misuse it, or abuse or injure it, or otherwise violate his own obligations. As to this, it seems that the owner cannot justify a seizure of the thing by force from the personal possession of the hirer, whatever may be his right to retake it, if he can peaceably, wherever he can find it, under other circumstances. Thus, for example, if a horse is let to hire for two days for a stipulated journey, and the hirer during that period should wrongfully use the horse for another journey, and should be found on such improper journey, the owner cannot justify seizing the horse and dragging the hirer off from the horse, while he is riding him.[5] The reason assigned is, that, for the two days, the hirer has a special property against all the world; and at all events, the wrong is to be punished by an action on the case, and not by a reseizure by force and violence from the person of the hirer.[6] But

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[1] Bac. Abr. *Trespass*, C.; Id. *Trover*, C.; Flewellin *v.* Rave, 1 Bulst. R. 69; Rooth *v.* Wilson, 1 Barn. & Ald. 59; 2 Saund. R. 47, and note; Ante, § 94, 280; Nicolls *v.* Bastard, 2 Cromp. Mees. & Rosc. 659, 660.

[2] Pothier, Contrat de Louage, n. 75, 77, 106; Hickok *v.* Buck, 22 Verm. 149.

[3] Hartford *v.* Jackson, 11 New Hamp. R. 145.

[4] Roberts *v.* Wyatt, 2 Taunt. R. 268. See Pothier, Contrat de Louage, n. 59, 60, 61, 64 to 74; Ante, § 373 a.

[5] Lee *v.* Atkinson, Yelv. R. 172; s. c. 1 Brownl. & G. R. 217. See Pothier, Contrat de Louage, n. 66 to 70.

[6] Ibid.

such a misuser would seem to amount to a virtual determination of the bailment, and thus to destroy the hirer's special property therein; so that there would not seem to be any sound objection to the owner's retaking the horse, if he could peaceably, and without any personal violence.[1] At all events, it is clear (as we shall presently see), that in such a case the owner may maintain trover against the hirer therefor.[2]

§ 397. In respect to the duties of the hirer. These are very succinctly stated by Domat. The engagements, says he, of the person who takes any thing to hire, are, to put the thing to no other use than that for which it is hired; to use it well; to take care of it; to restore it at the time appointed; to pay the price or hire; and, in general, to observe whatever is prescribed by the contract, or by law, or by custom.[3]

§ 398. In the first place, let us consider what is the degree of care or diligence to be employed by the hirer of the thing generally; for the exceptions to the rule will require a separate consideration. And here the degree of care exacted by the Roman law has been matter of some disputation. The language of the Digest is: *Contractus quidam dolum malum duntaxat recipiunt; quidam et dolum et culpam; dolum tantum, depositum et precarium; dolum et culpam mandatum, commodatum, venditum, pignori acceptum, locatum, item dotis datio, tutela, negotia gesta; in his quidem et diligentiam.*[4] And again: *Sed ubi utriusque utilitas vertitur, ut in empto, ut*

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[1] See Trotter *v.* McCall, 26 Miss. (4 Cushm.), 413.

[2] Wilkinson *v.* King, 2 Camp. R. 335; Loeschman *v.* Machin, 2 Stark. R. 311; McLauchlin *v.* Lomas, 3 Strobh. 85; Paley on Agency, 78, 79, 80, by Lloyd, and Powell *v.* Sadler, cited Id. 80, note (e); Youl *v.* Harbottle, Peake, R. 49; 2 Saund. R. 47 *f*, and notes of Williams and Patterson. See also, Anon. 2 Salk. R. 655; Ante, § 232, 233, 241; Post, § 413; Rotch *v.* Hawes, 12 Pick. R. 136; Homer *v.* Thwing, 3 Pick. 492; Cooper *v.* Willomatt, 1 Manning, Granger and Scott, R. 572. As to what acts of misconduct by a bailee will amount to a conversion or not of the property bailed, see the case of Fouldes *v.* Willoughby, 8 Mees. & Welsb. 540.

[3] 1 Domat, B. 1, tit. 4, § 2, art. 1; Pothier, Contrat de Louage, n. 133, 188 to 200; Pothier, Pand. Lib. 19, tit. 2, n. 38. See White *v.* Arnold, 6 Rich. 138.

[4] Dig. Lib. 50, tit. 17, l. 23.

in locato, ut in dote, ut in pignore, ut in societate, et dolus et culpa præstatur.[1] These passages point only to the rule, that the hirer is liable, not only for fraud, but for negligence. The degree of negligence is not stated. In the Institutes,[2] it is said: *Ab eo* [the hirer] *custodia talis desideratur, qualem diligentissimus paterfamilias suis rebus adhibet.* The question is, in what sense the word *diligentissimus* is here used. Does it signify a diligent father of a family, or a very diligent father of a family; or, in other words, does it import ordinary, or extraordinary diligence? Heineccius seems to consider the hirer liable, not only for fraud, but for ordinary negligence, as well as for gross negligence: *Culpam latam et levem* is his language.[3] Sir William Jones maintains, with great force and ability, that the word *diligentissimus*, in the text, imports no more than ordinarily diligent.[4] Pothier adopts the same interpretation.[5] Lord Holt, obviously founding himself upon Bracton,[6] supposed that it imports very diligent. And, accordingly, he held, that, "at the common law, a hirer was bound to very great diligence." "If," said he, "goods are let out for a reward, the hirer is bound to the utmost diligence; such as the most diligent father of a family uses."[7] And in Buller's Nisi Prius,[8] it is laid down, that the hirer is to take all imaginable care. Sir William Jones, on the contrary, contends, that the case, being one of mutual benefit, the hirer is bound only for ordinary diligence, and of course is responsible only for ordinary negligence.[9] And his opinion appears to be now settled, upon principle, to be the true ex-

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[1] Dig. Lib. 13, tit. 6, l. 5, § 2; Cod. Lib. 4, tit. 65, l. 28; Pothier, Pand. Lib. 13, tit. 6, n. 12.

[2] Just. Inst. Lib. 3, tit. 25, § 5.

[3] Heinecc. Pand. Lib. 19, tit. 2, § 324; 1 Domat, B. 1, tit. 4, § 2, art. 4.

[4] Jones on Bailm. 87, 88; Vinn. ad. Inst. Lib. 3, tit. 15, l. 2, Comm. § 13; 2 Kent, Comm. Lect. 40, p. 587, note (d), 4th edit.

[5] Pothier, Contrat de Louage, n. 192.

[6] Bracton, 62 b.

[7] Coggs *v.* Bernard, 2 Ld. Raym. 909, 916.

[8] Buller, Nisi Prius, p. 72.

[9] Jones on Bailm. 86, 87, 120; 2 Kent, Comm. Lect. 40, p. 586, 587, 4th edit.

position of the common law.[1] The rule laid down by Pothier is in exact conformity to that of the common law. He holds, that the hirer is bound only for ordinary diligence, and is liable only for ordinary negligence (*faute légère*).[2] He ought, therefore, to use the thing, and to take the same care in the preservation of it, which a good and prudent father of a family would take of his own.[3] The law of Louisiana adopts the same exposition.[4] This also is the rule of the Scottish law: *Præstat culpam levem.*[5]

§ 399. Hence the hirer of the thing, being responsible only for that degree of diligence which all prudent men use, that is, which the generality of mankind use, in keeping their own goods of the same kind,[6] it is very clear, that he can be liable only for such injuries as are shown to come from an omission of that diligence; or, in other words,

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[1] 1 Dane, Abridg. ch. 17, art. 3, 12; 2 Kent, Comm. Lect. 40, p. 586, 587, 4th edit., and note (d), Ibid.; Dean *v.* Keate, 3 Camp. R. 4; Millon *v.* Salisbury, 13 Johns. R. 211; Handford *v.* Palmer, 2 Brod. & Bing. R. 359; Platt *v.* Hibbard, 7 Cowen, R. 497; Reeves *v.* The Ship Constitution, Gilp. R. 579, 585, 586.

[2] Ante, § 65, note (3); Post, § 467, note.

[3] Pothier, Contrat de Louage, n. 190, 192, 429; 1 Domat, B. 1, tit. 4, § 2, art. 4; Cod. Lib. 4, tit. 65, l. 28; Code Civil of France, art. 1728; Ayliffe, Pand. B. 4, tit. 7, p. 463; Ersk. Inst. B. 3, tit. 3, § 14, 15. Pothier has examined this whole subject of responsibility for diligence with great ability, in some general observations on the Treatise of Monsieur Le Brun, to which Sir William Jones has referred in his essay [p. 30, note (t)], as printed "at the end of his Treatise on the Marriage Contract." It was so originally printed. But it is printed, in the later editions of Pothier's works, at the end of his Treatise on Obligations, although (strangely enough) it is altogether omitted in Sir William D. Evans's Translation of that work, to which it is properly an appendage. See Pothier on Obligations, 4to edition, 1781, printed at Orleans, Vol. I. p. 455 to 459; and the edition by Dupin of Pothier's works, printed at Paris, 1824, 8vo. Vol. I. p. 542 to 549; Ante, § 17, note (2). See also, Pothier, Pand. Lib. 50, tit. 17, De Regulis Juris, § 981.

[4] Nicholls *v.* Roland, 11 Martin, R. 190, 192.

[5] 1 Bell, Comm. p. 453, 455, 5th edit.; 1 Bell. Comm. § 389, 4th edit.; Ersk. Inst. B. 3, tit. 3, § 15; 1 Stair, Inst. B. 1, tit. 15, § 5.

[6] Jones on Bailm. 88; Handford *v.* Palmer, 2 Brod. & Bing. R. 359; Batson *v.* Donovan, 4 Barn. & Ald. 21; Reeves *v.* The Ship Constitution, Gilp. R. 579, 585, 586; 2 Kent, Comm. Lect. 40, p. 586, 587, 4th edit.

for ordinary negligence.[1] If a man hires a horse, he is bound to ride it moderately, and to treat it as carefully as any man of common discretion would his own, and to supply it with suitable food.[2] And if he does so, and the horse in such reasonable use is lamed or injured, he is not responsible for any damages.[3] If two persons jointly hire a horse and chaise on joint account, both are answerable for any misconduct or negligence of either in driving, and for any other want of proper care.[4] But it would be otherwise where one is the sole hirer, and the other is merely invited to ride; for, in such a case, the hirer alone will be responsible.[5]

§ 400. The hirer is not only liable for his own personal default and negligence, but for the default and negligence of his children, servants, and domestics, about the thing hired.[6] If, therefore, a hired horse is ridden by the servant of the hirer so immoderately that he is injured or killed thereby, the hirer is personally responsible.[7] So, if the servant of the hirer carelessly and improperly leaves open the stable door of the hirer, and the hired horse is stolen by thieves, the hirer is responsible

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[1] Post, § 408; Reeves *v.* The Ship Constitution, Gilp. R. 579, 585, 586; Eastman *v.* Sanborn, 3 Allen, 594; Whalley *v.* Wray, 3 Esp. R. 74; Ames *v.* Belden, 17 Barbour, 513. In Salter *v.* Hurst, 5 Louisiana R. (Miller), 7, 9, the Court said, that in all cases of hiring for use, if the thing hired perishes, when no fraud or gross negligence is chargeable on the hirer, the loss must be borne by the owner, upon the maxim, *Res perit domino.* But, *quære*, if this is not incorrect in principle; for ordinary negligence (not fraud or gross negligence) will make the hirer liable for the loss.

[2] Jones on Bailm. 88, 89; Pothier, Contrat de Louage, n. 190.

[3] Millon *v.* Salisbury, 13 Johns. R. 211; 1 Bell, Comm. p. 453, 454, 5th edit.; 1 Bell, Comm. § 389, 4th edit.; Story on Agency, § 452 to 461; Reeves *v.* The Ship Constitution, Gilp. R. 579, 591; Harrington *v.* Snyder, 3 Barbour, Supreme Ct. (N. Y.), R. 381.

[4] Davy *v.* Chamberlain, 4 Esp. R. 229.

[5] Ibid.

[6] Pothier, Contrat de Louage, n. 193, 428; 2 Kent, Comm. Lect. 40, p. 586, 587, 4th edit.; Pothier, Pand. Lib. 19, tit. 2, n. 31. Pothier holds the hirer responsible for the default or negligence of his boarders, guests, and under-tenants. Pothier, Contrat de Louage, n. 193; 1 Domat, B. 1, tit. 4, § 2, art. 6. See also, 1 Bell, Comm. § 389, 4th edit.; 1 Bell, Comm. p. 454, 455, 5th edit.

[7] Jones on Bailm. 89; 1 Black. Comm. 430, 431; 1 Domat, B. 1, tit. 4, § 2, art. 5; 1 Bell, Comm. p. 455, 5th edit.; 1 Bell, Comm. § 389, 4th edit.

therefor.[1] So, if ready furnished lodgings are hired, and the hirer's servants, children, guests, or boarders, negligently injure or deface the furniture, the hirer is responsible therefor.[2] So, if the injury is done by sub-agents, employed by the hirer, the same responsibility for the negligent acts of the former, about the thing bailed, is incurred by the latter.[3]

§ 401. The Roman law seems to have been relaxed a little from this severe, but important rule; for it made the master responsible only when he was culpably negligent in admitting careless guests, or boarders, or servants into his house. *Mihi ita placet* (says Ulpian in the Digest), *ut culpam etiam eorum, quos induxit* (his servants, guests, or boarders) *præstet suo nomine, etsi nihil convenit; si tamen culpam in inducendis admittit, quod tales habuerit, vel suos, vel hospites.*[4] It has been observed, by Pothier[5] and Sir William Jones,[6] that this distinction, whether the hirer was culpably negligent or not, that is, whether he ought, or ought not to have known of the bad habits or carelessness of his guests, servants, or domestics, who caused the damage, must have been sufficiently perplexing in practice. The rule of the common law, which is like that of the foreign law in modern times, is not only more safe, convenient, and uniform in its application, but it imposes upon the hirer a salutary diligence and caution in regard to those who are admitted into his house, or kept in his service.[7] The letter can otherwise have no other sufficient security against losses from the misconduct of guests, or boarders, or servants.

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[1] Jones on Bailm. 89; Coggs *v.* Bernard, 2 Ld. Raym. 909, 910; Salem Bank *v.* Gloucester Bank, 17 Mass. R. 1. See Dansey *v.* Richardson, 25 Eng. Law & Eq. R. 90; 3 El. & Bl. 722.

[2] Jones on Bailm. 89; Pothier, Contrat de Louage, n. 193.

[3] Story on Agency, § 308, 311, 452, 457; Randleson *v.* Murray, 3 Nev. & Per. 239; s. c. 8 Adolph. & Ellis, R. 109; Bush *v.* Steinman, 1 Bos. & Pull. 409; Laugher *v.* Pointer, 5 Barn. & Cress. 547, 553, 554; Boson *v.* Sandford, 2 Salk. R. 440; Milligan *v.* Wedge, 12 Adolph. & Ellis, 737; Quarman *v.* Burnett, 6 Mees. & Welsb. R. 499.

[4] Dig. Lib. 19, tit. 2, l. 11; Dig. Lib. 9, tit. 2, l. 27, § 11; Pothier, Contrat de Louage, n. 193.

[5] Pothier, Contrat de Louage, n. 193; 1 Domat, B. 1, tit. 4, § 2, art. 5.

[6] Jones on Bailm. 89, 90.

[7] Pothier, Contrat de Louage, n. 193.

§ 402. But the master is not universally liable for the misdeeds of his servants; and, therefore, we are to distinguish whether the act complained of has been done in the service of the master, or in obedience to his orders, or not; for in the former cases only is the master responsible. The master is not responsible for any wilful or malicious injury done by his servant, without his knowledge or consent; but only for injuries which are done by the servant in the master's service in the course of his employment.[1] [And if the acts are done by the servant in course of his employment, the master is liable, although the acts are in disobedience to the master's orders.[2]]

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[1] Story on Agency, § 308, 310, 311, 452 to 457.

[2] [Philadelphia and Reading Railroad Co. *v.* Derby, 14 Howard, U. S. R. 468, Mr. Justice Grier said: The second instruction involves the question of the liability of the master where the servant is in the course of his employment, but, in the matter complained of, has acted contrary to the express command of his master.

The rule of "*respondeat superior*," or that the master shall be civilly liable for the tortious acts of his servant, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent, or deceitful. If it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize, or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment. See Story on Agency, § 452; Smith on Master and Servant, 152.

There may be found, in some of the numerous cases reported on this subject, dicta which, when severed from the context, might seem to countenance the doctrine that the master is not liable if the act of his servant was in disobedience of his orders. But a more careful examination will show that they depended on the question, whether the servant, at the time he did the act complained of, was acting in the course of his employment, or in other words, whether he was or was not at the time in the relation of servant to the defendant.

The case of Sleath *v.* Wilson, 9 Carr. & Payne, 607, states the law in such cases distinctly and correctly.

In that case a servant, having his master's carriage and horses in his possession and control, was directed to take them to a certain place; but instead of doing so he went in another direction to deliver a parcel of his own, and, returning, drove against an old woman and injured her. Here the master was held liable for the act of the servant, though at the time he committed the offence, he was acting in disregard of his master's orders; because the master had intrusted the carriage to his control and care, and in driving it he was acting in the course of his employment. Mr. Justice Erskine remarks, in this

Thus, if a servant, in driving his master's coach, by his negligence runs against and injures another coach, his master is responsible for the injury to the owner of the injured coach.[1] But it is otherwise, if the servant wilfully and wantonly drives against the other coach, and thus does the injury without the

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case: "It is quite clear that if a servant, without his master's knowledge, takes his master's carriage out of the coach-house, and with it commits an injury, the master is not answerable, and on this ground, that the master has not intrusted the servant with the carriage; but whenever the master has intrusted the servant with the control of the carriage, it is no answer, that the servant acted improperly in the management of it. If it were, it might be contended that if a master directs his servant to drive slowly, and the servant disobeys his orders, and drives fast, and through his negligence occasions an injury, the master will not be liable. But that is not the law; the master, in such a case, will be liable, and the ground is that he has put it in the servant's power to mismanage the carriage, by intrusting him with it."

Although, among the numerous cases on this subject, some may be found (such as the case of Lamb *v.* Palk, 9 C. & P. 629) in which the Court have made some distinctions which are rather subtile and astute, as to when the servant may be said to be acting in the employ of his master; yet we find no case which asserts the doctrine that a master is not liable for the acts of a servant in his employment, when the particular act causing the injury was done in disregard of the general orders or special command of the master. Such a qualification of the maxim of *respondeat superior*, would, in a measure, nullify it. A large proportion of the accidents on railroads are caused by the negligence of the servants or agents of the company. Nothing but the most stringent enforcement of discipline, and the most exact and perfect obedience to every rule and order emanating from a superior, can insure safety to life and property. The intrusting such a powerful and dangerous engine as a locomotive, to one who will not submit to control, and render implicit obedience to orders, is itself an act of negligence, the "*causa causans*" of the mischief; while the proximate cause, or the *ipsa negligentia* which produces it, may truly be said, in most cases, to be the disobedience of orders by the servant so intrusted. If such disobedience could be set up by a railroad company as a defence, when charged with negligence, the remedy of the injured party would in most cases be illusive, discipline would be relaxed, and the danger to the life and limb of the traveller greatly enhanced. Any relaxation of the stringent policy and principles of the law affecting such cases, would be highly detrimental to the public safety.]

[1] Ante, § 400, 401; McManus *v.* Crickett, 1 East, R. 106; Croft *v.* Alison, 4 Barn. & Ald. 590; Brucker *v.* Fromont, 6 Term R. 659; 8 Term R. 188; Story on Agency, § 452 to 456; Laugher *v.* Pointer, 5 Barn. & Cress. 547, 553, 554.

connivance or consent of his master.[1] So, if the servant of a blacksmith, in shoeing a horse, negligently injures him, the master is responsible.[2] But it will be otherwise, if he maliciously drives a nail into the horse's foot in order to lame him.[3]

§ 403. The hirer is not responsible for any injury by the negligence of servants, who are not actually in his employ. If a person hires a coach and horses of a stable-keeper for a journey, and the horses are driven by the servant of the latter, he (it seems), and not the hirer, is responsible for any injury done by the negligence of the servant in the course of the journey; for the servant, under such circumstances, is properly to be deemed in the employment of the stable-keeper, and not of the hirer.[4] For the like reason, if a person hires a carriage and horses, and the owner sends a postilion or coachman with them to drive them, the hirer is discharged from all attention to the carriage and horses; and he remains liable only to take ordinary care of the glasses and inside of the carriage, while he sits in it.[5] The like rule governs in the French law; and the reason given is, that in such a case the coachman is the servant of the owner, and is intrusted with the care of the carriage and horses.[6]

§ 403 *a*. But very nice questions have sometimes arisen, as to the person who is to be properly deemed the employer or principal, under particular circumstances.[7] Thus, for example, although it seems admitted, that where a coach and horses are hired for a day, or for a journey, and are driven by a person who is furnished and hired by the stable-keeper, the driver is to be deemed, at least under ordinary circumstances, to be the servant of the stable-keeper, and not of the hirer, so that, if any injury

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[1] Ibid.

[2] 1 Black. Comm. 431; Story on Agency, § 310, 453.

[3] Boson *v.* Sandford, 2 Salk. R. 440; Story on Agency, § 310, 453.

[4] Sammel *v.* Wright, 5 Esp. R. 263; Dean *v.* Branthwaite, 5 Esp. R. 35; Pothier, Contrat de Louage, n. 196.

[5] Jones on Bailm. 88, 89; Pothier, Contrat de Louage, n. 196.

[6] Pothier, Contrat de Louage, n. 196; Id. 107, 129; Ante, § 388.

[7] See 10 Amer. Jurist, p. 256, 257, 258; Milligan *v.* Wedge, 12 Adolph. & Ellis, R. 737.

arises from his negligence in driving, the stable-keeper will be responsible therefor;[1] yet if the coach belongs to the hirer, and the horses and driver only are furnished by the stable-keeper, there has been a diversity of opinion, whether the driver was not to be deemed the servant of the hirer, and in his employment, so that the hirer would be responsible for any injury arising from his negligence in driving.[2] But the doctrine seems now settled, that in this last case, as well as in the former, the hirer is not responsible for the acts of negligence of the driver; but that he is to be deemed the servant of the owner of the horses, and in his employ, and that the owner is liable for such acts of negligence.[3]

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[1] Ante, § 403; Laugher *v.* Pointer, 5 Barn. & Cress. 437; Story on Agency, § 453, and note (5); Hughes *v.* Boyer, 9 Watts, R. 556; Quarman *v.* Burnett, 6 Mees. & Welsb. R. 499.

[2] See Laugher *v.* Pointer, 5 Barn. & Cress. 547. In this case, the subject was discussed at large, and all the leading authorities cited. It turned upon similar circumstances to those stated in the text. Littledale, J., and Abbott, C. J., thought that the driver was in the employment of the stable-keeper, and the latter was responsible for his negligence; and Holroyd, J., and Bailey, J., thought that the hirer was responsible, and the driver was his servant. See also, Dean *v.* Branthwaite, 5 Esp. R. 35; Bush *v.* Steinman, 1 Bos. & Pull. 404; Milligan *v.* Wedge, 12 Adolph. & Ellis, 737; Randleson *v.* Murray, 8 Adolph. & Ellis, 109; Quarman *v* Burnett, 6 Mees. & Welsb. 499.

[3] Quarman *v.* Burnett, 6 Mees. & Welsb. 499. Mr. Baron Parke, in delivering the opinion of the Court, said: "On the argument, in the course of which the principal authorities were referred to, we intimated our opinion, that we should be called upon to decide the point which arose in the case of Laugher *v.* Pointer, and upon which not only the Court of King's Bench, but the twelve Judges, differed; as the special circumstances above mentioned did not seem to us to make any difference; and we are still of opinion, that they did not. It is undoubtedly true, that there may be special circumstances, which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at one particular moment, and the like. As to the supposed choice of a particular servant, my brother Maule thought there was *some* evidence to go to the Jury of the horses being under the defendant's care, in respect of their choosing this particular coachman. We feel a difficulty in saying, that there was any evidence of choice, for the servant was the *only* regular coachman of the job-mistress's yard; when he was

§ 404. But, although the master is responsible for the misfeasances and negligent acts of his servants, it does not follow,

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not at home, the defendants had occasionally been driven by another man, and it did not appear that, at any time since they had their own carriage, the regular coachman was engaged, and they had refused to be driven by another; and the circumstance of their having a livery, for which he was measured, is at once explained by the fact, that he was the only servant of Miss Mortlock ever likely to drive them. Without, however, pronouncing any opinion upon a point of so much nicety, and so little defined, as the question whether there is *some* evidence to go to a Jury of any fact, it seems to us, that if the defendants had asked for this particular servant, amongst many, and refused to be driven by any other, they would not have been responsible for his acts and neglects. If the driver be the servant of a job-master, we do not think he ceases to be so by reason of the owner of the carriage preferring to be driven by that particular servant, where there is a choice amongst more, any more than a hack post-boy ceases to be the servant of an innkeeper, where a traveller has a particular preference of one over the rest, on account of his sobriety and carefulness. If, indeed, the defendants had insisted upon the horses being driven, not by one of the regular servants, but by a stranger to the job-master, appointed by themselves, it would have made all the difference. Nor do we think that there is any distinction in this case, occasioned by the fact, that the coachman went into the house to leave his hat, and might therefore be considered as acting by their directions, and in their service. There is no evidence of any special order, in this case, or of any general order to do so at all times *without leaving any one at the horses' heads.* If there had been any evidence of that kind, the defendants might have been well considered as having taken the care of the horses upon themselves in the mean time. Besides these two circumstances, the fact of the coachman wearing the defendants' livery with their consent, whereby they were the means of inducing third persons to believe that he was their servant, was mentioned in the course of the argument as a ground of liability, but cannot affect our decision. If the defendants had told the plaintiff, that he might sell goods to their livery servants, and had induced him to contract with the coachman on the footing of his really being such servant, they would have been liable on such contract; but this representation can only conclude the defendants with respect to those who have altered their condition on the faith of its being true. In the present case, it is a matter of evidence only of the man being their servant, which the fact at once answers. We are therefore compelled to decide upon the question, left unsettled by the case of Laugher *v.* Pointer, in which the able judgments on both sides have, as is observed by Mr. Justice Story in his book on Agency, § 453, note, p. 468, 'exhausted the whole learning of the subject, and should on that account attentively be studied.' We have considered them fully, and we think the weight of authority and legal principle is in favor of the view taken by Lord Tenterden and Mr. Justice Littledale. The immediate cause of the injury is

that the servant is not himself, in many cases, also responsible to the bailor. The distinction furnished by the authorities is

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the personal neglect of the coachman in leaving the horses, which were at the time in his immediate care. The question of law is, whether any one but the coachman is liable to the party injured; for the coachman certainly is. Upon the principle, that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable, who stood in the relation of master to the wrongdoer, — he who had selected him as his servant, from the knowledge of, or belief in, his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference. But the liability by virtue of the principle of relation of master and servant must cease where the relation itself ceases to exist; and no other person than the master of such servant can be liable, on the simple ground that the servant is the servant of another, and his act the act of another; consequently, a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable; and to make such person liable, recourse must be had to a different and more extended principle, namely, that a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person, in carrying into execution that which that other person has contracted to do for his benefit. That, however, is too large a position, as Lord Chief Justice Eyre says, in the case of Bush *v.* Steinman (1 Bos. & Pull. 404), and cannot be maintained to its full extent, without overturning some decisions, and producing consequences which would, as Lord Tenterden observes, 'shock the common sense of all men.' Not merely would the hirer of a post-chaise, hackney-coach, or wherry on the Thames, be liable for the acts of the owners of those vehicles, if they had the management of them, or their servants, if they were managed by servants, but the purchaser of an article at a shop, which he had ordered the shopman to bring home for him, might be made responsible for an injury committed by the shopman's carelessness while passing along the street. It is true, that there are cases — for instance, that of Bush *v.* Steinman, Sly *v.* Edgely (6 Esp. 6), and others, and perhaps amongst them may be classed the recent case of Randleson *v.* Murray — in which the occupiers of land or buildings have been held responsible for acts of others than their servants, done upon, or near, or in respect of their property. But these cases are well distinguished by my brother Littledale, in his very able judgment in Laugher *v.* Pointer. The rule of law may be, that, where a man is in possession of fixed property, he must take care that his property is so used or managed, that other persons are not injured; and that whether his property be managed by his own immediate servants, or by contractors with them, or their servants. Such injuries are in the nature of nuisances; but the same principle, which applies to the personal occupation of

this; that the servants of the bailee are responsible to the bailor for their misfeasances, but not for their nonfeasances; and that, in the latter cases, the remedy of the bailor is solely against the master.[1]

§ 405. What is the true extent of the duty and diligence required of the hirer, in the care and custody of the thing hired, must essentially depend upon the nature and character of that thing, and its liability to loss or injury.[2] A single illustration will sufficiently explain this doctrine in one of the most common cases of hire. It is the duty of the hirer of a horse to supply him with suitable food during the time of the hiring; and, therefore, any neglect on his part, in this particular, will make him responsible to the owner for the damage sustained thereby.[3] If a hired horse is exhausted, and refuses its feed, the hirer is bound to abstain from using the horse; and if he pursues his journey with the horse, he is liable for all the injury occasioned thereby.[4] If a horse falls sick during a journey, the

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land or houses by a man or his family, does not apply to personal movable chattels, which, in the ordinary conduct of the affairs of life, are intrusted to the care and management of others, who are not the servants of the owners, but who exercise employments on their own account, with respect to the care and management of goods for any persons who choose to intrust them with them. It is unnecessary to repeat at length the reasons given by my brother Littledale for this distinction, which appears to us to be quite satisfactory; and the general proposition above referred to, upon which only can the defendants be liable for the acts of persons who are not their servants, seems to us to be untenable. We are therefore of opinion, that the defendants were not liable in this case, and the rule must be made absolute to enter a verdict for the defendants on the second issue." See also, Rapson *v.* Cubitt, 9 Mees. & Welsb. 710; Milligan *v.* Wedge, 12 Adolph. & Ellis, 737; Winterbottom *v.* Wright, 10 Mees. & Welsb. 109, 111; Reedie *v.* London & Northwestern Railway Co. 4 Welsb. Hurlst. & Gordon, Exch. 244.

[1] Lane *v.* Cotton, 12 Mod. R. 488; Perkins *v.* Smith, Sayer, R. 41; Cameron *v.* Reynolds, Cowp. R. 403; Rowning *v.* Goodchild, 3 Wilson, R. 454; 5 Burr. R. 2721; Morse *v.* Slue, 1 Vent. 238. This subject is examined at large in Story on Agency, § 309 to 320, and the principal authorities are there collected. There are some exceptions to the general rule, which are also there stated. The examination of the doctrine more properly belongs to the subject of Agency, than to that of Bailments, and therefore is omitted in this place.

[2] Ante, § 12 to 15.

[3] Handford *v.* Palmer, 2 Brod. & Bing. 359; s. c. 5 Moore, R. 74.

[4] Bray *v.* Mayne, 1 Gow, R. 1; 1 Bell, Comm. p. 455, 5th edit.; 1 Bell

hirer ought to procure the aid of a farrier, if one can be obtained within a reasonable time or distance; and if he does procure such aid, he is not responsible for any mistakes of the farrier in the treatment of the horse. But if, instead of procuring the aid of a farrier, when he reasonably may, he himself prescribes unskilfully for the horse, and thus causes his death, he will be responsible for the damages, although he acts *bonâ fide*.[1]

§ 406. What shall, and what shall not, be deemed negligence on the part of a hirer, is sometimes a matter of considerable nicety. The care and diligence must rise in proportion to the demand for it; and things which may be easily deteriorated require an increase of care and diligence in the use of them. Negligence is a relative term; and the value and liability to injury of the article, and the means of security possessed by the hirer, are material circumstances in estimating the degree of care and diligence which are required of him.[2] It has been already stated, that Pothier, and after him Sir William Jones, holds, that a loss by theft is *primâ facie* evidence of negligence;[3] and reasons have been also offered to establish the position, that no such rule exists in the common law, however it may exist in the Roman law, or in the foreign law.[4] But even if there be such a rule, it is but a bare presumption, and capable of being rebutted by proof, that the theft was by no negligence of the hirer.[5]

Comm. § 389, 4th edit. See Eastman *v.* Sanborn, 3 Allen, 595; Edwards *v.* Carr, 13 Gray, 234.

[1] Dean *v.* Keate, 3 Camp. R. 4; 1 Bell, Comm. p. 455, 5th edit.; 1 Bell, Comm. § 389, 4th edit.

[2] 2 Kent, Comm. Lect. 49, p. 587, 4th edit.; Batson *v.* Donovan 4 Barn. & Ald. 21.

[3] Jones on Bailm. 43, 44, 76, 78, 98, 110; Ante, § 38, 39, 88, 239, 333 to 338; Pothier, Prêt à Usage, n. 53; Pothier, Contrat de Louage, n. 429; Pothier, Pand. Lib. 19, tit. 2, n. 28; Vere *v.* Smith, 1 Vent. 121.

[4] Pothier, Contrat de Louage, n. 429; Ante, § 38, 39, 88, 239, 333 to 338; Post, § 410, 454; Pothier, Pand. Lib. 19, tit. 2, n. 28.

[5] Jones on Bailm. 96, 98; Coggs *v.* Bernard, 2 Ld. Raym, 909, 918; Ante, § 38, 39, 88, 239, 333 to 338. We have already had occasion to express a doubt, whether, in the Roman law, a loss by theft was presumptive evidence of negligence. See Ante, § 334, note (2). The following case, put in the Digest,

§ 407. In respect to thefts by the servants of a hirer, he is not, generally speaking, liable therefor, unless there are some circumstances which impute to him a want of due diligence.[1] Thus, if a trunk is deposited with an upholsterer for a reward, the contents of which are stolen by his servants, notwithstanding all reasonable care in the custody of it by him, he will not be responsible for the loss.[2] But if he uses greater precaution in respect to the like property of his own, that might afford presumptive evidence of neglect; and he might, under such circumstances, be held liable for the loss.[3] So, if a watch is deposited with a watchmaker for repairs, and it is left in his shop in a less secure repository than that in which he keeps his own, and it is stolen by his servants, he will be responsible for the loss.[4] So, if an agister of cattle for a reward leaves open the gates of his field, or allows the fences to be defective, so that the cattle escape, he is liable for the loss.[5] In like manner, the proprietors of a dry dock are responsible for any injury to a vessel undergoing repairs there, occasioned by the bursting of the dock gates, if by reasonable care the bursting might have been prevented.[6]

§ 408. But if the thing hired is lost or injured by inevitable casualty, or by superior force, and without any fault of

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seems to fortify that doubt. Si capras latrones citra tuam fraudem abegisse, probari potest, judicio locati casum præstare non cogeris; atque temporis, quod insecutum est, mercedes ut indebitas recuperabis. Dig. Lib. 19, tit. 2, l. 9, § 4; Pothier, Pand. Lib. 19, tit. 2, n. 28. Certainly, in the Roman law, theft was not a conclusive presumption of negligence; but it might be repelled by proofs.

[1] Ante, § 38, 39, 67, 88, 239, 333 to 338.

[2] Finucane *v.* Small, 1 Esp. R. 315. See also, Brind *v.* Dale, 8 Carr. & Payne, 207; s. c. 2 Mood. and Rob. 80; Butt *v.* Great Western Railway Co. 7 Eng. Law & Eq. R. 448; 11 C. B. 140; Great Western Railway Co. *v.* Rimell, 27 Law Journ. C. P. 201; 6 J. Scott, N. S. 917 (Am. Ed.); 18 C. B. 575.

[3] Ante, § 337.

[4] Clarke *v.* Earnshaw, 1 Gow, R. 30.

[5] See Dansey *v.* Richardson, 25 Eng. Law & Eq. R. 90; 3 El. & Bl. 722; Broadwater *v.* Blot, Holt, N. P. R. 547; Jones on Bailm. 91, 92; 1 Bell, Comm. p. 458, 5th edit.; 1 Bell, Comm. § 394, 4th edit.; Ante, § 67.

[6] Leck *v.* Maestaer, 1 Camp. R. 138.

the hirer, he is exonerated from all risk.[1] So, if the loss is not strictly inevitable, but there has been no omission of reasonable diligence on the part of the hirer.[2] Thus, a warehouseman is not responsible for the destruction of goods, deposited there for hire, by rats or mice, if he has used the ordinary precautions to guard against the loss.[3] So, if the owner of slaves lets them to the master of a vessel for a voyage, and they run away in a foreign port, the master is not responsible therefor, if he has acted in good faith and with reasonable care, although he might, perhaps, have exercised a higher power of restraint or confinement over them.[4] So, if a horse is let to hire for a journey, and without any negligence or default of the hirer, he escapes, and is lost, or stolen, the hirer will not be responsible therefor.

§ 409. Pothier puts the case (which he deems clear), in proof of the position, that the hirer may be responsible for a loss, where his misconduct is not the cause, but the occasion, of the loss.[5] If the bailee is prohibited by the terms of the bailment from keeping combustible materials in the place where the thing is kept, and he keeps such combustibles there, and the thing is destroyed by fire, even through mere casualty, Pothier holds him responsible therefor; because it is a breach of his engagement.[6] Such also is the rule of the Roman

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[1] Menotone *v.* Athawes, 3 Burr. R. 1592; Longman *v.* Galini, Abbott on Shipp. P. 4, ch. 6, p. 389, note (*d*), 7th ed; 1 Bell, Comm. p. 453, 455, 458, 5th edit.; 1 Bell, Comm. § 394, 4th edit.; Reeves *v.* The Ship Constitution, Gilp. R. 579; Ames *v.* Belden, 17 Barbour, 513; Ante, § 399.

[2] Menotone *v.* Athawes, 3 Burr. R. 1592; Longman *v.* Galini, Abbott on Shipp. P. 4, ch. 6, p. 389, note (*d*), 7th edit.; 1 Bell, Comm. p. 453, 455, 458, 5th edit.; 1 Bell, Comm. § 394, 4th edit.; Reeves *v.* The Ship Constitution, Gilp. R. 579; Ante, § 399.

[3] Cailiff *v.* Danvers, Peake, R. 114; Moore *v.* Mourgue, Cowp. R. 479; Millon *v.* Salisbury, 13 Johns. R. 211; Abbott on Shipp. P. 3, ch. 3, § 9, p. 244, 5th edit. But the rule of the Roman law seems to have been different in this case. The Digest says: Si fullo vestimenta polienda acceperit, eaque, mures roserint, ex locato tenetur. Dig. Lib. 19, tit. 2, l. 13, § 6; Pothier, Pand. Lib. 19, tit. 2, n. 29; Post, § 432.

[4] Beverly *v.* Brooke, 2 Wheat. R. 100.

[5] Ante, § 242.

[6] Pothier, Contrat de Louage, n. 195. See also, 1 Bell, Comm. p. 458, 5th edit.; 1 Bell, Comm. § 394, 4th edit.; Ante, § 242.

law: *Si hoc in locatione convenit, ignem ne habeto, et habuit, tenebitur, etiamsi fortuitus casus admisit incendium, quia non debet ignem habere.*[1] Pothier puts another case to illustrate the distinction between the cause and the occasion of a loss. If, says he, the hirer of a horse for a journey is attacked by robbers on the road, and the horse is killed by them, so that it may properly be deemed a loss by the *vis major*, yet if the hirer has, by his own fault, been the occasion of the loss, as by riding at improper hours, or by having quitted the highway and taken a shorter route, which is less safe, he will be responsible for the loss.[2] It seems, that, by the Roman law, the hirer is also made liable for all losses and injuries to the thing hired, occasioned by the private enmity of persons hostile to the hirer, if by his own fault he has provoked that enmity. *Culpæ autem ipsius et illud adnumeratur, si propter inimicitias ejus vicinus arbores exciderit.*[3] But Pothier justly doubts whether this rule ought to be followed in practice.[4]

§ 410. The question may here arise, as in many other cases of bailments, on whom lies the burden of proof of negligence, or of repelling it.[5] With certain exceptions, which will hereafter be taken notice of, as to innkeepers and common carriers,[6] [and, it seems, of slaves dying in the possession of the bailee],[7] it would seem, that the burden of proof of negligence, is on the bailor; and proof merely of the loss is not sufficient to put the bailee on his defence.[8] This has been ruled in a case against

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[1] Dig. Lib. 19, tit. 2, l. 11, § 1; Pothier, Pand. Lib. 19, tit. 2, n. 33.

[2] Ante, § 67, 200, 241, 242; Post, § 412; Pothier, Contrat de Louage, n. 195; Pothier, Prêt à Usage, n. 57; Id. n. 55; Jones on Bailm. 67, 68, 70, 71; Story on Agency, § 217, 218, 219.

[3] Dig. Lib. 10, tit. 2, l. 25, § 4; Pothier, Pand. Lib. 19, tit. 2, n. 34.

[4] Pothier, Contrat de Louage, n. 195; 1 Domat, B. 1, tit. 4, § 2, art. 6; Dig. Lib. 19, tit. 2, l. 25, § 4; Pothier, Pand. Lib. 19, tit. 2, n. 34.

[5] Ante, § 212, 213, 278, 339.

[6] 5 Term R. 276; Jones on Bailm. 96.

[7] Ford *v.* Simmons, 13 Louis. An. 397; Harvey *v.* Eppes, 12 Gratt. 153.

[8] 1 Bell, Comm. § 889, 4th edit.; 1 Bell, Comm. p. 454, 5th edit.; 2 Kent, Comm. Lect. 40, p. 587, 4th edit. See Adams *v.* Carlisle, 21 Pick. R. 146; Carsley *v.* White, 21 Pick. R. 254, 255; Brind *v.* Dale, 8 Carr. & Payne, 207, 212; s. c. 2 Mood. & Rob. 80. [Foote *v.* Storrs, 2 Barbour, Supreme Court

a depositary for hire, where the goods bailed were stolen by his servants;[1] and also in the case of a horse hired and injured during the term of the bailment, where positive proof was required on the part of the owner to sustain his action.[2] [But in a recent case, where the bailee returned the horse in an injured condition, and gave no explanation how the injury occurred, the burden of proof was held to be upon him, to show that there was no negligence.[3]] There seem, however, to be some discrepancies in the authorities on this subject, which may properly invite the attention of the learned reader.[4]

§ 411. According to the French law, as laid down by Pothier, in every case of loss the hirer is bound to prove, that the loss was without any default on his own part; for the law not only makes no presumption in his favor, but presumes it to be by his fault, unless he establishes the contrary.[5] Thus, if a person hires a horse for a journey, he cannot excuse himself from the obligation to return the horse, by saying, that he died by accident during the journey. It will be necessary for him to prove such accident by the testimony of farriers, or other persons, who had seen the horse when he became sick.[6] Pothier also seems to think, that, in case of a loss by fire, if the fire is in the house of the hirer, that circumstance alone raises a presumption of negligence.[7] The Code of France[8] throws the

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(N. Y.), R. 326, overruling Platt *v.* Hibbard, 7 Cowen, R. 497. See also, Harrington *v.* Snyder, 3 Barbour, Supreme Court R. 380]; Post, § 454, 529.

[1] Finucane *v.* Small, 1 Esp. R. 315. And see Butt *v.* Great Western Railway Co. 7 Eng. Law & Eq. R. 448; 11 C. B. 140.

[2] Cooper *v.* Barton, 3 Camp. R. 5, note; Newton *v.* Pope, 1 Cowen, R. 109; 1 Bell, Comm. § 389, 4th edit.; 1 Bell, Comm. p. 454, 5th edit.

[3] Logan *v.* Mathews, 6 Barr, R. 417. And see Bush *v.* Miller, 13 Barb. 481.

[4] Platt *v.* Hibbard, 7 Cowen, R. 497, 500, note (a); Harris *v.* Packwood, 3 Taunt. R. 264; Marsh *v.* Horne, 5 Barn. & Cress. 322; Anon. 2 Salk. R. 654; Schmidt *v.* Blood, 9 Wend. R. 268; Beardslee *v.* Richardson, 11 Wend. R. 25; Tompkins *v.* Saltmarsh, 14 Serg. & Rawle, R. 275; Beckman *v.* Shouse, 5 Rawle, R. 179; Clark *v.* Spence, 10 Watts, R. 335; Ante, § 212, 213, 278, 339; Post, § 454, 529; 2 Kent, Comm. Lect. 40, p. 587, 4th edit.

[5] Pothier, Contrat de Louage, n. 199, 200; Id. n. 194.

[6] Pothier, Contrat de Louage, n. 199.

[7] Pothier, Contrat de Louage, n. 194, 199, 200.

[8] Code Civil of France, art. 1732, 1733, 1734.

burden of proof upon the hirer of leased property to show that the loss has not been by his default; and it makes him responsible for losses by fire, unless he proves that the fire happened by inevitable casualty, or, by means of superior force, it was communicated from a neighboring house. By the Scottish law, if any specific injury has occurred, not manifestly accidentally, the *onus probandi* lies on the hirer to justify himself by proving the accident.[1] The Code of Louisiana seems to follow the rule of the common law, and requires proof that the loss was by the default or negligence of the hirer, or others acting under him.[2]

§ 412. In cases of robbery, the hirer is not chargeable, unless it has been occasioned by his own fault or negligence; for robbery is deemed an accident by superior force (*vis major*).[3] If, however, the hirer travels by roads known to be dangerous by reason of their being infested by robbers, or at an unseasonable hour of the night, or if, in any other manner, by his own negligence, he exposes the property to an undue risk of robbery, and a loss happens thereby, he will, as we have already seen, be bound to make good the loss.[4] But if he takes another road, because the common highway is impracticable or dangerous, and other travellers are accustomed to do the same, he will be justified in so doing; and if a loss takes place by robbery on the road in consequence, he will not be responsible therefor.[5]

§ 413. As to the use of the thing hired. There is, on the part of the hirer, an implied obligation, not only to use the thing with due care and moderation,[6] but also not to apply it to

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[1] 1 Bell, Comm. 454, 5th edit.; 1 Bell, Comm. § 389, 4th edit.

[2] Code of Louisiana (1825), art. 2691, 2692, 2693.

[3] Ante, § 26, 239; Jones on Bailm. 44, 78, 79, 88, 98, 103, 122; Coggs *v.* Bernard, 2 Ld. Raym. 909, 916; Id. 1087; Id. 918; Pothier, Contrat de Louage, n. 195.

[4] Ante, § 200, 241, 396, 409; Jones on Bailm. 81, 88, 98, 103; Pothier, Contrat de Louage, n. 195; Coggs *v.* Bernard, 2 Ld. Raym. 909, 917.

[5] Pothier, Contrat de Louage, n. 195; Ante, § 241, 409.

[6] See Robinson *v.* Varnell, 16 Texas, 382; Sims *v.* Chance, 7 Texas, 561; Latimer *v.* Alexander, 14 Geo. 260; Gorman *v.* Campbell, 14 Geo. 137.

any other use than that for which it is hired.[1] Thus, if a horse is hired as a saddle horse, the hirer has no right to use the horse in a cart, or to carry loads, or as a beast of burden.[2] So, if a carriage and horses are hired for a journey to Boston, the hirer has no right to go with them on a journey to New York.[3] So, if horses are hired for a week, the hirer has no right to use them for a month.[4] [So, in the absence of any agreement as to the number of persons who are to ride in a hired carriage, the hirer is authorized to carry such number only as the vehicle was made for, not exceeding, of course, the ordinary load adapted to the team drawing the same.[5]] And it may be generally stated, that if the thing is used for a different purpose from that which was intended by the parties, or in a different manner, or for a longer period, the hirer is not only responsible for all damages, but, if a loss afterwards occurs, although by inevitable casualty, he will generally be responsible therefor.[6] In short, such misuser is deemed at the common law a conversion of the property, for which the hirer is generally held responsible to the letter, to the full extent of his loss.[7] So, if a bailee for hire for a limited period should

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[1] Pothier, Contrat de Louage, n. 189, 190; Ante, § 232, 233, 241, 396; Pothier, Pand. Lib. 19, tit. 2, n. 28, 29. See Mills *v.* Ashe, 16 Texas, 295; Trotter *v.* McCall, 26 Miss. 413.

[2] Pothier, Contrat de Louage, n. 189, 190; 1 Domat, B. 1, tit. 4, § 2, art. 2, 3; Jones on Bailm. 68; Id. 88; 2 Saund. 47 *g*, and note; 1 Bell, Comm. 454; Lockwood *v.* Bull, 1 Cowen, R. 322.

[3] Jones on Bailm. 68; Coggs *v.* Bernard, 2 Ld. Raym. 915; Ante, § 188, 232, 233, 241, 373 a, 396; Pothier, Prêt à Usage, n. 55, 56, 57, 58, 59, 60; Rotch *v.* Hawes, 12 Pick. R. 136; Homer *v.* Thwing, 3 Pick. R. 492; Wheelock *v.* Wheelwright, 5 Mass. R. 104.

[4] Jones on Bailm. 68; Coggs *v.* Bernard, 2 Ld. Raym. 915; Wheelock *v.* Wheelwright, 5 Mass. R. 104.

[5] Harrington *v.* Snyder, 3 Barbour, Supreme Ct. (N. Y.), R. 380.

[6] De Tollenere *v.* Fuller, 1 Rep. Const. C. So. Carol. 121; Jones on Bailm. 68, 69, 121; 2 Ld. Raym. 909, 917; Dig. Lib. 19, tit. 2, l. 11, § 4; Id. l. 12; Pothier, Pand. Lib. 19, tit. 2, n. 38; Ante, § 122, 188, 232, 233, 241, 269, 396, 409; Mayor *v.* Howard, 6 Geo. 219; Hooks *v.* Smith, 18 Ala. 338; Post, § 509.

[7] Bac. Abridg. *Bailment*, C.; Id. *Trover*, C., D., E.; 2 Saund. R. 47 *g;* Isaac *v.* Clarke, 2 Bulst. R. 306, 309; Ante, § 232, 233, 241, 473 a, 396; Wilkinson *v.* King, 2 Camp. R. 335; Loeschman *v.* Machin, 2 Stark. R. 311; Youl *v.*

make an *absolute* sale of the goods hired before the expiration of the term, the bailment would be ended, and a suit might be maintained against him by the bailor for a tortious conversion thereof, or against the purchaser if he refused to return the property on demand.[1]

§ 413 *a*. But, although this is the general rule, a question may arise, how far the misconduct or negligence or deviation from duty of the hirer will affect him with responsibility for a loss, which would and must have occurred, even if he had not been guilty of any such misconduct, negligence, or deviation from duty. As, for example, suppose a cargo of lime is put on board of a vessel on freight, to be carried from A to B, and the master should unnecessarily deviate from the voyage, and afterwards a storm should arise and the lime should be wetted and the vessel should thereby take fire and the whole be lost; according to the general rule, the loss must be borne by the owner of the vessel; for, although the tempest might properly in one view be deemed the proximate cause of the loss, yet, according to the doctrine of Pothier, the deviation would be the occasion of the loss;[2] and at the common law, the loss would be held sufficiently proximate to the wrongful act of deviation, and to be properly attributable to it, so as to support an action by the shipper.[3] But suppose the deviation, although voluntary, were for so short a time, or under such circumstances, as that the vessel must have been overtaken by the same tempest, and the same accident must have occurred; the question would then arise, whether the owner would be liable for the loss.[4]

Harbottle, Peake, R. 49; 2 Saund. R. 47 *f*, note by Williams & Patteson; Powell *v.* Sadler, cited in Paley on Agency, by Lloyd, 79, 80, note (*e*); Rotch *v.* Hawes, 12 Pick. R. 136; Homer *v.* Thwing, 3 Pick. R. 492; Wheelock *v.* Wheelwright, 5 Mass. R. 104; Cooper *v.* Willomatt, 1 Manning, Granger & Scott, R. 672; Harrington *v.* Snyder, 3 Barbour, Supreme Ct. (N. Y.), R. 380.

[1] Sargent *v.* Gile, 8 New Hamp. R. 325; Lovejoy *v.* Jones, 10 Foster, 165; Sanborn *v.* Coleman, 6 New Hamp. 14; Bailey *v.* Colby, 34 New Hamp. 29.

[2] Ante, § 67, 200, 241, 409, 412; Pothier, Contrat de Louage, n. 195.

[3] Davis *v.* Garrett, 6 Bing. R. 716; 3 Kent, Comm. Lect. 47, p. 210, 4th edit.; Bell *v.* Reed, 4 Binn. R. 127; Post, § 515.

[4] See Lord Chief Justice Tindal's opinion in Davis *v.* Garrett, 6 Bing. R. 716; Post, § 413 d, note (4).

§ 413 *b*. Other cases may easily be put to illustrate the same point. Suppose a ship, on board of which goods are shipped on freight for the voyage, should deviate from the port of destination, and proceed to another port of the same country which, after the commencement of the voyage, becomes an enemy country; and on arrival at the port the ship is captured, the capture being equally inevitable, if she had arrived at the original port of destination; the question would then arise, whether, the loss being in each case inevitable, the shipper could recover for the loss of his goods on account of the deviation. Suppose a case, where goods are shipped on board of a ship on freight for the voyage, to be carried under deck, and by the misconduct of the master the goods are stowed on deck; there, if the goods are lost by reason of such wrongful stowage on deck, as by a sea, which sweeps the deck, there can be no doubt, that the owner of the ship is responsible for the loss. But suppose the ship should by inevitable casualty founder at sea in a heavy gale, and the whole cargo, under deck, as well as on deck, should thus be lost, the loss being in no degree attributable to the stowage; there the question would arise, whether the owner of the ship is responsible for the loss.[1]

§ 413 *c*. We have already seen, that the Roman law seems to have adopted a distinction on this subject, and to have held the bailee, who is *in morâ*, liable for all losses by accident after his default, unless they are such as must have occurred to the thing bailed independently of the default.[2] Pothier supports the same doctrine.[3] Sir William Jones in the passage already cited manifestly maintains it; for he there says, that in every species of bailment, where the bailee is *in morâ*, he must answer for any casualty which happens after the demand, unless in cases where it may be strongly presumed that the same ac-

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[1] See Story on Agency, § 218, 219; 3 Kent, Comm. Lect. 47, p. 206, 4th edit.; Post, § 413 c, 413 d; Jones on Bailm. 70, 71.

[2] Dig. Lib. 19, tit. 3, l. 12, § 3; Id. l. 14, § 1; Id. 13, tit. 6, l. 18; Id. 30, tit. 1, l. 47, § 6; Id. 6, tit. 1, l. 15, § 3; Id. 10, tit. 4, l. 12, § 4; Ante, § 122, 189, 259, 413; Pothier, Pand. Lib. 16, tit. 3, n. 33; Id. Lib. 13, tit. 6, n. 17, 18, 19; Id. Lib. 13, tit. 7, n. 17.

[3] Pothier, Prêt à Usage, n. 55–58; Pothier on Oblig. n. 143, 627, 628 (n. 663, 664, of the French editions).

cident would have befallen the thing bailed, even if it had been restored at the proper time.[1]

§ 413 *d.* There are certainly intimations in various common-law authorities, which lead to a similar conclusion. Thus for example, it has been said, that, if goods are improperly stowed on the deck of a ship, and they are washed away by the violence of a storm, the owner of the ship will be liable for the loss, although caused by the perils of the sea, unless the dangers were such as would equally have occasioned the loss, if the goods had been safely stowed under deck.[2] So it has been held, that if there is negligence and a violation of duty by a common carrier, as by not carrying the goods in the proper position required for them; yet if the loss is not a consequence thereof, but is caused solely by the perils of the seas, or by some other unavoidable casualty, the carrier will not be liable for the loss.[3] So, if the ship be not seaworthy, but the loss is caused by some peril of the sea or other casualty wholly disconnected with the want of seaworthiness, the carrier will not be liable for the loss;[4] although he certainly would be liable, if the loss happened from that defect.[5] And in the case of the lime, before put,[6] which actually occurred in judgment, it was thought susceptible of doubt, whether, if the loss must have happened, even if there had been no deviation from the voyage, the owner of the ship would have been liable therefor. But the Court held, that, as there was no proof that the loss would have happened if the deviation had not taken place, the owner of the ship was liable therefor; and the other point was left undecided.[7] The question, therefore, in the present state of

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[1] Ante, § 259; Jones on Bailm. 70, 71.

[2] Crane *v.* The Rebecca, cited 6 Amer. Jurist, 1, 15; Ware, R. 188; 3 Kent, Comm. Lect. 47, p. 206, 4th edit.

[3] Hastings *v.* Pepper, 11 Pick. 41, 43, 44; The Paragon, Ware, Rep. 322, 324.

[4] Collier *v.* Valentine, 11 Missouri, 299; Hart *v.* Allen, 2 Watts, 114.

[5] Bell *v.* Reed, 4 Binn. 127, 138; Hollingworth *v.* Brodrick, 7 Adolph. & Ellis, R. 40; The Paragon, Ware, Rep. 322, 324.

[6] Ante, § 413 *a.*

[7] Davis *v.* Garrett, 6 Bing. R. 716. On this occasion Lord Chief Justice Tindal said: "There are two points for the determination of the Court upon

the authorities, must still be deemed open to controversy. Whenever it is discussed, it will deserve consideration, whether

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this rule; first, whether the damage sustained by the plaintiff was so approximate to the wrongful act of the defendant as to form the subject of an action; and secondly, whether the declaration is sufficient to support the judgment of the Court for the plaintiff. As to the first point, it appeared upon the evidence, that the master of the defendant's barge had deviated from the usual and customary course of the voyage mentioned in the declaration, without any justifiable cause; and that afterwards, and whilst such barge was out of her course, in consequence of stormy and tempestuous weather, the sea communicated with the lime, which thereby became heated, and the barge caught fire, and the master was compelled, for the preservation of himself and the crew, to run the barge on shore, where both the lime and the barge were entirely lost. Now the first objection on the part of the defendant is not rested, as indeed it could not be rested, on the particular circumstances which accompanied the destruction of the barge; for it is obvious, that the legal consequences must be the same, whether the loss was immediately by the sinking of the barge at once by a heavy sea, when she was out of her direct and usual course, or whether it happened at the same place, not in consequence of an immediate death's wound, but by a connected chain of causes producing the same ultimate event. It is only a variation in the precise mode by which the vessel was destroyed, which variation will necessarily occur in each individual case. But the objection taken is, that there is no natural or necessary connection between the wrong of the master in taking the barge out of its proper course, and the loss itself; for that the same loss might have been occasioned by the very same tempest, if the barge had proceeded in her direct course. But if this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the plaintiff to recover. For if a ship is captured in the course of deviation, no one can be certain that she might not have been captured if in her proper course. And yet, in Parker *v.* James, 4 Campb. 112, where the ship was captured whilst in the act of deviation, no such ground of defence was even suggested. Or, again, if the ship strikes against a rock, or perishes by storm in the one course, no one can predicate that she might not equally have struck upon another rock, or met with the same or another storm, if pursuing her right and ordinary voyage. The same answer might be attempted to an action against a defendant, who had, by mistake, forwarded a parcel by the wrong conveyance, and a loss had thereby ensued; and yet the defendant in that case would undoubtedly be liable. But we think the real answer to the objection is, that no wrongdoer can be allowed to apportion or qualify his own wrong; and that, as a loss has actually happened, whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a differ-

there is, or ought to be, any difference between cases where the misconduct of the hirer amounts to a technical or an actual conversion of the property to his own use, and cases where there is merely some negligence or omission or violation of duty in regard to it, not conducing to or connected with the loss.[1]

§ 414. Another implied obligation of the hirer is, to restore the thing hired, when the bailment is determined.[2] He is bound to restore it to the owner; and if by any negligence or wrongful act it is delivered to some other person, and thereby is lost to the owner, he will be responsible therefor. If it is delivered to another person, it amounts to a conversion.[3] So, the hirer is to restore it in as good condition as he received it, unless it has been injured by some internal decay, or by accident, or by some other means, wholly without his default.[4] If it has sustained any injury by his neglect, he is liable for all the damages, notwithstanding the owner has received it back.[5] If the hirer, instead of delivering back the thing, pays its full value to the owner, on account of the injury sustained by his

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ent construction, if he could show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done; but there is no evidence to that extent in the present case." In the English edition the same passage occurs in p. 722 to 724.

[1] See Ante, § 122, 188, 232, 233, 241, 259, 269, 380, 396, 409; Post, § 509. See also, Wheelock *v.* Wheelwright, 5 Mass. R. 104; Homer *v.* Thwing, 3 Pick. R. 492; Rotch *v.* Hawes, 12 Pick. R. 136; Hollingworth *v.* Brodrick, 7 Adolph. & Ellis, R. 40; Davis *v.* Garrett, 6 Bing. R. 716; The Paragon, Ware, R. 322, 324; 1 Domat, B. 1, tit. 16, § 2, art. 4. See Powers *v.* Mitchell, 3 Hill, R. 545.

[2] Syeds *v.* Hay, 4 Term R. 264, per Buller, J.; Pothier, Contrat de Louage, n. 197; Pothier, Pand. Lib. 19, tit. 2, n. 27, 28, 29; Benje *v.* Creagh, 21 Ala. 151.

[3] Stephenson *v.* Hart, 4 Bing. R. 476; Stephens *v.* Elwall, 4 Maule & Selw. 259; Youl *v.* Harbottle, Peake, R. 49; Devereux *v.* Barclay, 2 Barn. & Ald. 702; Willard *v.* Bridge, 4 Barbour, Sup. Ct. (N. Y.), R. 361; Esmay *v.* Fanning, 9 Barbour, 189.

[4] Pothier, Contrat de Louage, n. 197, 198, 200; Pothier, Pand. Lib. 19, tit. 2, n. 27, 28, 29; 1 Domat, B. 1, tit. 4, § 2, n. 11; Cooper *v.* Barton, 3 Camp. R. 5, n.; Millon *v.* Salisbury, 13 Johns. R. 211.

[5] Reynolds *v.* Shuler, 5 Cowen, R. 323; Ante, § 269.

own negligence, he becomes henceforth the proprietor of the thing; and the letter has no longer any title to it. So the bailee is liable for an injury to the goods caused by his negligence while in his possession, notwithstanding a subsequent like loss by inevitable accident or irresistible force.[1]

§ 415. The time, and the place, and the mode of restitution of the thing hired, and the person to whom it is to be restored, are governed by the circumstances of each particular case, and depend upon the same rules of presumption of the intention of the parties, and the same general principles of law, as are applicable in other cases of bailment.[2]

§ 415 *a*. The remarks which have been already made, as to the restitution of the thing hired, apply, of course, only to regular contracts of hire, and not to irregular contracts of hire, the nature of which has been already explained.[3] In the latter cases, as the identical thing is not to be returned, but only something of a similar nature; as if an ingot of silver is delivered to a smith to be melted and wrought into an urn, the proprietary interest in the silver passes to the hirer (*ipsa nummorum corpora*), and no return is contemplated. The silver is, of course, at the sole risk of the hirer, who must respond for the thing which is to be returned, although the silver shall have been lost by inevitable accident or irresistible violence.[4] This, however, is to be received with the qualification, that it is the intention of the parties, that the proprietary interest should so pass to the hirer under the contract. For it would without doubt be otherwise, if the same silver, on account of its peculiar fineness, or any uncommon metal, according to the whim of the owner, were to be specifically redelivered to him in the form of a cup or a standish.[5]

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[1] Pothier, Contrat de Louage, n. 198; Id. n. 431, 432; Ante, § 276; Pothier, Pand. Lib. 19, tit. 2, n. 36; Powers *v.* Mitchell, 3 Hill, R. 545.

[2] Ante, § 102 to 110, 117, 118, 120, 257, 261, 265, 266, 291.

[3] Ante, § 370 a; Pothier, Traité de Dépôt, n. 82.

[4] Pothier, Contrat de Louage, n. 394; Pothier, Traité de Dépôt, n. 82; Jones on Bailm. 102, 103; 2 Kent, Comm. Lect. 40, p. 588, 589, 4th edit.; Ante, § 370; Post, § 438, 539.

[5] Jones on Bailm. 102, 103.

§ 416. Another implied obligation on the part of the hirer is, to pay the stipulated hire or recompense to the letter.[1] This is a natural result from the contract of hire, and requires no reasoning to support it. Pothier, however, has thought it worthy of a separate discussion, principally with reference to leases of real estates on rent, in respect to which there are many points entitled to grave consideration, which cannot properly find a place in the more limited view of bailments at the common law; which, as we have seen, respect personal or movable property only.[2]

§ 417. According to the general principles of the foreign law, and especially of the French law, the entire hire is not due, unless the hirer has had the use and enjoyment of the thing hired for the whole time, and in the manner contemplated by the parties.[3] If he has not had, and could not have, any use or enjoyment whatsoever of the thing hired, he is not bound to pay any thing.[4] If he has had the use or enjoyment for a part of the time only, or it has been from unforeseen circumstances greatly diminished in mode or extent, he ought not to be required to pay more than a proportionate hire, *pro tanto*.[5] If various things are hired, and the use and enjoyment of a part of them only have been realized, the hirer ought, in like manner, to be liable only *pro tanto*.[6] But, in all these cases, it is to be understood, that the deficiency in the use and enjoyment has not been occasioned by the default of the hirer, but has arisen from accident, or from the default of the letter;[7] and that the obligation to pay the entire hire is not either expressly or impliedly stipulated for by the contract, notwithstanding any deficiency in the use or enjoyment.[8]

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[1] Pothier, Contrat de Louage, n. 134; 1 Domat, B. 1, tit, 4, § 2, art. 11; Code Civil of France, art. 1728.

[2] Pothier, Contrat de Louage, n. 134 to 164; Ante, § 51, 223, 286, 373, 392.

[3] Pothier, Contrat de Louage, n. 139.

[4] Pothier, Contrat de Louage, n. 138, 139, 142, 143.

[5] Pothier, Contrat de Louage, n. 139, 140, 143, 144; Ersk. Inst. B. 3, tit. 3, § 15; 1 Bell, Comm. 452, 453, 5th edit.

[6] Pothier, Contrat de Louage, n. 140, 141.

[7] Pothier, Contrat de Louage, n. 141, 142, 143.

[8] Pothier, Contrat de Louage, n. 141 to 144; Id. n. 165, 168; Id. n. 178.

§ 417 *a*. Whether the like principles are fully adopted in the common law, cannot, in the absence of direct adjudications, be positively affirmed. That these principles are in a high degree equitable cannot be doubted. Where there has not been any use or enjoyment of the thing hired, without the default of the hirer, whether it has been occasioned by accident, or by the default of the letter, no hire whatsoever will, by the common law, become due; for that law generally insists upon the contract being fully and strictly performed, to entitle the letter to any recompense.[1] By the common law, also, the apportionment of contracts is generally discountenanced; and a partial performance on either side will not entitle either party to insist upon a compensation or claim, *pro tanto*.[2] Courts of equity have, in this respect, followed closely in the footsteps of the law, and have declined, unless under very special circumstances, to adopt the more liberal and expansive doctrine, dictated by the general principles of reciprocal justice.[3] But wherever, from the nature and objects of the contract, or from general usage, an apportionment of the contract can be inferred to be according to the real intention of the parties, if there be but a partial performance on the one side, or a partial enjoyment on the other side, without any default by either party, courts of law, as well as courts of equity, will allow a recompense *pro tanto*.[4]

§ 418. The next consideration is, as to the manner in which the contract of hire may be dissolved or extinguished. According to the general principles of the Roman and foreign law, the contract may be dissolved or extinguished in respect to future liabilities in various ways. (1) By the mere efflux of the time, or the accomplishment of the object, for which the thing is hired; (2) By the loss or destruction of the thing by

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[1] 1 Story on Eq. Jurisp. § 471 to 482; Cutter *v.* Powell, 6 Term R. 320; Appleby *v.* Dods, 8 East, R. 300.

[2] Ibid.; Viner, Abridg. *Apportionment*, A. to F.

[3] Story on Eq. Jurisp. § 471 to 474, 480.

[4] Story on Eq. Jurisp. § 471 to 482; Vin. Abridg. A. pl. 8, 9, which cites the case of Worth *v.* Viner; Id. B. pl. 10, &c.; Id. F. pl. 18; Edwards *v.* Child, 2 Vern. R. 727; Cutter *v.* Powell, 6 Term R. 320.

any inevitable casualty; (3) By a voluntary dissolution of the contract by the parties; and (4) By operation of law, as where the hirer becomes proprietor by purchase or otherwise of the thing hired.[1] Of course, it is to be understood, that the mere efflux of time, or the other circumstances above stated, do not absolve the parties from antecedent liabilities and obligations contracted by the hiring, so far as they are not completely fulfilled; but only as to liabilities and obligations to be incurred *in futuro*.[2]

§ 418 *a*. But here again it may be important to state that it cannot be positively affirmed, that the common law, although in most respects it agrees with the rules of the Roman and foreign law on these points, follows them throughout. The hiring is of course terminated by the efflux of the time for which the thing is hired, or the accomplishment of the object for which the thing is hired, so that the hirer can no longer insist upon any further use, or the letter upon any further hiring, or recompense. In general, too, if the thing hired perishes by accident, and without any default of either party during the time of the hire, the contract is dissolved. But then, in such a case (as we have seen), the result generally is, that the letter can claim no recompense for the hire *pro tanto*, by way of apportionment; and, on the other hand, the hirer cannot ordinarily insist upon damages for any loss he may sustain thereby. The particular contract of the parties may, however, vary these results. So, if there is a voluntary dissolution of the contract by the parties, what will be the effect thereof upon their rights will depend upon the particular stipulations which produce it; for here the maxim applies: *Modus et conventio vincunt legem*. The other case, that of a dissolution by opera-

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[1] Pothier, Contrat de Louage, n. 308, 309, 310; Code Civil of France, art. 1741. This article declares, that the contract of hire is dissolved by the destruction of the thing hired, and by the default of the letter and hirer respectively, in fulfilling their engagements. The Code of Louisiana seems to adopt similar provisions. Code of Louisiana of 1825, art. 2698, 2699, 2700. See also, Ersk. Inst. B. 3, tit. 3, § 15; 1 Bell, Comm. p. 453, 5th edit.; 1 Bell, Comm. § 388, 4th edit.

[2] Pothier, Contrat de Louage, n. 30.

tion of law, by becoming the owner of the thing hired, seems founded upon a principle equally applicable to all; that a party cannot be a debtor to, or contractor with, himself.

§ 419. Whether the contract is dissolved by the death of either party, must depend upon the particular intention of the parties, and the general rules of law applicable to contracts of this sort. By the Roman and French law, the contract of hiring is not ordinarily dissolved by the death of either party; and the obligations and rights of each, in such a case, pass to their respective personal representatives. There are, however, some exceptions; as, for example, if the letter had a limited title to a thing for his life only, there the contract would ordinarily cease with his life.[1] So, if the hiring is to be for no fixed time, but merely during the pleasure of both parties, or of one of them, there the death of that party will operate a dissolution of the contract. In such a case, it is treated as a mere precarious contract: *Locatio, precariive rogatio, ita facta, quoad is, qui eam locasset, dedissetve, vellet, morte ejus, qui locavit, tollitur.*[2] On the other hand, if the hiring is to be for a fixed period, there it generally remains in full force during that period, notwithstanding the death of one or of both of the parties.[3]

§ 420. The principles stated in the last section are derived altogether from the Roman and foreign law. How far they are to be deemed satisfactorily established in our jurisprudence, is a matter for future inquiry, since the common law does not furnish any direct recognitions of them. But it may be safely affirmed, that they are so consonant with general justice, and with the nature of the contract, that, in the absence of any controlling authority, they may be used as fit guides to assist our general reasoning.[4]

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[1] Pothier, Contrat de Louage, n. 317.

[2] Dig. Lib. 10, tit. 2, l. 4; Pothier, Contrat de Louage, n. 317.

[3] Pothier, Contrat de Louage, n. 317; 1 Bell, Comm. p. 452, 453, 5th edit.

[4] See Story on Agency, § 462 to 500.

ART. II. HIRE OF LABOR AND SERVICES.

§ 421. We are next led to the consideration of the rights, duties, and obligations of the parties in the second class of Bailments for Hire, LOCATIO OPERIS, or the Hiring of Labor and Services. This (as has been already observed),[1] is divisible into two branches: (1) LOCATIO OPERIS FACIENDI; (2) LOCATIO OPERIS MERCIUM VEHENDARUM.[2] Each of these will be treated separately, as each is of very extensive use and influence in the business of civil life;[3] and each in some respects involves, or may involve, distinct principles and considerations.

§ 422. And first, as to LOCATIO OPERIS FACIENDI. This may, again, be divided into two kinds: (1) The Hire of Labor and Services, or *Locatio operis faciendi*, strictly so called; such as the hire of tailors to make clothes, of jewellers to set gems, and of watchmakers to repair watches;[4] (2) *Locatio custodiæ*, or the receiving of goods on deposit for a reward for the custody thereof, which is properly the hire of care and attention about the goods.[5] The bailee in the latter case may well enough be called *locator operæ*, since the care and attention which he lets out for pay are in truth principally a mental operation, although the custody generally includes some physical labor.[6] To this last class belong warehouse-men, and wharfingers, and other depositaries for hire.[7] And as these differ from mere depositaries principally in receiving a compensation for their services;[8] so another class of hirers, namely, agents, factors, commission-merchants, bailiffs,[9] and other per-

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[1] Ante, § 370; Jones on Bailm. 90.

[2] Ante, § 370; Jones on Bailm. 90.

[3] Jones on Bailm. 90; 2 Kent, Comm. Lect. 40, p. 586, 4th edit.; Merlin, Repert. art. *Louage*.

[4] Jones on Bailm. 90, 91; 1 Bell, Comm. § 390, 4th edit.; Id. p. 455, 5th edit.

[5] Jones on Bailm. 96.

[6] Jones on Bailm. 90, 96, 97; Merlin, Repert. art. *Louage*.

[7] Garside *v.* Trent Navigation Company, 4 Term R. 581; Post, § 444, 451; Jones on Bailm. 96; White *v.* Humphery, 11 Adolph. & Ellis, N. S. 45.

[8] Jones on Bailm. 49, 98.

[9] 2 Ld. Raym. 909, 918; Jones on Bailm. 97, 98; Post, § 455.

sons acting for a compensation, differ from mandataries, principally in the same circumstances.[1] The undertaking of the latter class lies in feasance; that of the former in custody.[2] Innkeepers seem to partake of the character of both; but they will be reserved for a separate consideration.[3]

§ 422 *a*. Bailees for hire of labor and services, like bailees for hire of things, have, or at least may have, a special property in the thing about which the labor and services are to be performed.[4] Hence, where a bailee of yarn was to procure it to be made into cloth for a commission, it was held that he had a special property in the yarn, and that he might maintain an action against any one who should wrongfully take it from his own possession, or from that of his servant, to whom he had delivered it to be woven.[5]

§ 423. In the Roman and foreign law all agencies for hire, and all sorts of labor and services, are sometimes treated of under the head of bailments for hire, although such agencies as are strictly of a personal nature, or for personal acts, are more frequently treated of under the head of mandates; especially when they are said to lie in feasance, and not simply in custody, or are altogether disconnected from custody.[6] In the common law, such agencies and labor and services only are included under the head of bailments, as are employed about personal property intrusted by the owner to the bailee. But in strict-

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[1] Jones on Bailm. 98; Post, § 455; Eaton *v.* Lynde, 15 Mass. R. 242.

[2] Jones on Bailm. 98.

[3] Jones on Bailm. 49, 92, 93, 94; Post, § 464 to 487.

[4] Eaton *v.* Lynde, 15 Mass. R. 242; Ante, § 394.

[5] Eaton *v.* Lynde, 15 Mass. R. 242. See Barker *v.* Roberts, 8 Greenl. R. 101. So a factor or consignee may maintain trover for the goods against a wrongdoer. Evans *v.* Nichol, 4 Scott, N. R. 43.

[6] 1 Domat, B. 1, tit. 4, § 7, art. 2, 3, 4; Pothier, Contrat de Louage, n. 392. In the modern Code of France (art. 1984 to 2010), and in that of Louisiana (1825, art. 2954 to 3003), personal agencies are treated of under the head of mandates; and hiring of labor and services about things, under the distinct head of hire. See Code of France, art. 1779 to 1797; Code of Louisiana of 1825, art. 2717 to 2748. See Story on Agency, § 4; 1 Bell, Comm. § 389, 390, 4th edit.; 1 Bell, Comm. p. 452, 453, 455, 456, 5th edit.; Ante, § 423; Post, § 455.

ness, all these symptoms of law concur in the same general doctrine. Where the workman is not only to do the work but is also to furnish the materials, it is deemed in the Roman and foreign law rather a case of sale than a case of *locatio operis.*[1] In the common law, it is treated as a case of bailment only when the stock or materials belong to the employer. Where the principal materials belong to the employer, the case is still treated as a mere bailment, although the workman may furnish some accessorial materials or ornaments.[2] Thus, if A sends cloth to a tailor to be made into a garment, and the tailor furnishes buttons and twist to complete it, it is a mere case of *locatio operis faciendi.*[3] [And it has been held to be so, although the labor and materials used in the repairs greatly exceeded the value of the article when left to be repaired.[4]]

§ 424. In cases of the hire of things, the bailee is to pay the hire; but in cases of the hire of work, the bailor is to pay it. In the former case, *Res utenda datur;* in the latter, *Res facienda datur.*[5] In many other respects, these contracts involve the like or corresponding obligations between the parties.[6] According to the systematical mode of treating them in the foreign law, both contracts may be said to arise from natural law; to be founded in consent; and to involve reciprocal engagements.[7] In contracts for work, it is of the essence of the contract, (1) That there should be work to be done; (2) That it should be to be done for a price or reward; and (3) That there should be a lawful contract between parties capable and intending to contract.[8]

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[1] Pothier, Contrat de Louage, n. 392, 394; Id. n. 4; 1 Domat, B. 1, tit. 4, § 7, art. 1 to 4; Dig. Lib. 19, tit. 2, l. 2, § 1; Inst. Lib. 4, tit. 25, § 4; Merlin, Repert. art. *Louage;* 1 Bell, Comm. p. 455, 5th edit.; 1 Bell, Comm. § 392, 4th edit.

[2] Pothier, Contrat de Louage, n. 394; 1 Bell, Comm. p. 455, 5th edit.; 1 Bell, Comm. § 390, 4th edit.

[3] Pothier, Traité de Dépôt, n. 82. See as to cases of regular and of irregular hiring, Ante, § 370 *a*, 415 *a;* Post, § 438, 439. See also, Ante, § 84.

[4] Gregory *v.* Stryker, 2 Denio, R. 629.

[5] Pothier, Contrat de Louage, n. 393.

[6] Pothier, Contrat de Louage, n. 393.

[7] Pothier, Contrat de Louage, n. 393.

[8] Pothier, Contrat de Louage, n. 395 to 401, 403; Ante, § 371, 372.

§ 424 *a*. Of course, if, at the time when the work is undertaken, it is physically impossible to be done, the contract is treated as a nullity. For here the maxim applies: *Impossibilia nulla obligatio est.*[1] Pothier has given, under this head, a somewhat dubious illustration. Thus, says he, if I have made a bargain with one to remove a house from one place to another without demolishing it, or taking it down, this is the bargain of a fool, and is utterly without any obligation; for it is impossible.[2] He doubtless intended to speak of a building, which was physically incapable of being so removed. But, in some parts of America, a wooden dwelling-house might be the just subject of such a bargain; and, indeed, it has not unfrequently been executed. However, if the thing is possible to be done, although not possible to be done by the undertaker, Pothier holds the latter responsible in damages upon his undertaking; because it was his duty, before he made the bargain, to have consulted his own ability and means, and not to have surpassed them.[3] The other considerations, applicable to the price, or reward, the legality of the contract, and the capacity of the contracting parties, have been already sufficiently considered.[4]

§ 425. The obligations or duties on the part of the employer, as deduced in the foreign law, are principally these: — (1) To pay the price or compensation; (2) To pay for all proper new and accessorial materials; (3) To do every thing on his part to enable the workman to execute his engagement; (4) And, finally, to accept the thing when it is finished. But care is to be taken, that the materials are not extravagant, and that the claims are not beyond the fair scope of the engagement.[5] Besides these duties, the employer is bound to good faith and honesty in his conduct. He must not conceal defects, or practise fraud upon the other party; and he must conform to all the special stipulations contained in his contract.[6] These

[1] Pothier, Contrat de Louage, n. 395; Dig. Lib. 50, tit. 17, l. 185.

[2] Pothier, Contrat de Louage, n. 395.

[3] Pothier, Contrat de Louage, n. 396.

[4] Ante, § 372 to 381; Pothier, Contrat de Louage, n. 397 to 403.

[5] Pothier, Contrat de Louage, n. 405, 406, 407 to 410, 436, 437; 1 Domat, B. 1, tit. 4, § 9, art. 1 to 8.

[6] Pothier, Contrat de Louage, n. 411 to 417.

duties are formally treated of by Pothier;[1] and they seem so clear, upon principles of general justice, that the common law could hardly be deemed a rational science if it did not recognize them.

§ 426. If, while the work is doing on a thing belonging to the employer, or after it is finished, but before it is delivered to the employer, the thing perishes by internal defect, by inevitable accident, or by irresistible force, without any default of the workman, Pothier holds that the latter is entitled to compensation to the extent of the value of the labor actually performed on it, unless his contract import a different obligation; for the maxim is, *Res perit domino*.[2] Pothier further insists, that, if the workman has employed his own materials, as accessorial to those of the employer, he is in like manner entitled to be paid for them, if the thing perishes before it is completed.[3] The same doctrine seems to have been promulgated in the Roman law, and was applied to the case of a house accidentally thrown down by an earthquake, while in building; and the loss was held to fall wholly on the owner. *Marcus domum faciendam a Flacco conduxerat; deinde operis parte effectâ terræ motu concussum erat ædificium. Massurius Sabinus, si vi naturali, veluti terræ motu, hoc acciderit, Flacci esse periculum.*[4] Mr. Bell has deduced the following as the true rules on the subject: (1) If the work is independent of any materials or property of the employer, the manufacturer has the risk, and the unfinished work perishes to him; (2) If he is employed in working up the materials, or adding his labor to the property of the employer, the risk is with the owner of the thing with which the labor is incorporated; (3) If the work has been performed in such a way as

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[1] Pothier, Contrat de Louage, n. 405 to 417.

[2] Pothier, Contrat de Louage, n. 433; Dig. Lib. 19, tit. 2, l. 59; 1 Domat, B. 1, tit. 4, § 9, art. 4, 8, 9; Menetone *v.* Athawes, 3 Burr. R. 1592; Gillett *v.* Mawman, 1 Taunt. R. 137; 1 Bell, Comm. § 392, 394, 4th edit.; 1 Bell, Comm. p. 456, 458, 5th edit.; Post, § 437; 2 Kent, Comm. Lect. 40, p. 589, 590, 4th edit.

[3] Pothier, Contrat de Louage, n. 433; 1 Bell, Comm. § 392, 4th edit.; 1 Bell. Comm. p. 456, 5th edit.; 1 Domat, B. 1, tit. 4, § 8, art. 9.

[4] Dig. Lib. 19, tit. 2, l. 59; Pothier, Pand. Lib. 19, tit. 2, n. 68.

to afford a defence to the employer against a demand for the price, if the accident had not happened (as if it was defectively or improperly done), the same defence will be equally available to him after the loss.[1] In this last point, Pothier also agrees with him; and he seems supported by the Roman law.[2]

§ 426 *a*. These principles seem also well founded in the common law, and will probably receive the like adjudication in each of these cases, whenever it shall arise directly in judgment.[3] It is very clear, at the common law, that if the thing of the employer, on which the work is done, and for which materials are furnished, is by accident, and without any fault of the workman, destroyed or lost before the work is completed, or the thing is delivered back, the loss must be borne by the employer, and he must pay the workman a full compensation for the work and labor already done, and materials found, although he has derived no benefit therefrom.[4] Thus, where a ship was accidentally destroyed by fire, while she was in the dock of a shipwright, undergoing repairs, it was held that the shipwright was entitled to full compensation for all his work and labor done, and materials found and applied thereto, before the loss.[5] However, the general rule may be controlled by a special agreement of the parties or by the general usage and custom of the trade.[6]

§ 426 *b*. The foregoing doctrine proceeds upon grounds applicable to the general contract of hire. But suppose there is a contract to do work on a thing by the job (as, for example, repairs on a ship), for a stipulated price for the whole work, and the thing should accidentally perish, or be destroyed, without any default on either side, before the job is completed,

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[1] 1 Bell, Comm. p. 456, 5th edit.

[2] Pothier, Contrat de Louage, n. 434; Dig. Lib. 19, tit. 2, l. 37; Pothier, Pand. Lib. 19, tit. 2, n. 68.

[3] Post, § 437.

[4] Menetone *v.* Athawes, 3 Burr. R. 1592; Gillett *v.* Mawman, 1 Taunt. 137; 2 Kent, Comm. Lect. 40, p. 590, 4th edit.

[5] Menetone *v.* Athawes, 3 Burr. R. 1592.

[6] Gillett *v.* Mawman, 1 Taunt. R. 137.

the question would then arise, whether the workman would be entitled to compensation *pro tanto* for his work and labor done, and materials applied, up to the time of the loss or destruction. It would seem, that, by the common law, in such a case (independent of any usage of trade) the workman would not be entitled to any compensation; and that the rule would apply, that the thing should perish to the employer, and the work to the mechanic;[1] for the contract by the job would be treated as an entirety, and should be completed, before the stipulated compensation would be due. If, indeed, the job was completed before the accident or loss, although the thing was not delivered, it would or might be otherwise; for then the mechanic would or might be entitled to his full compensation.[2] This seems also to be the rule of the Roman law, where the work was taken by the job, and was not completed when the accident occurred. *Opus, quod aversione locatum est, donec approbetur, conductoris periculum est.*[3] If the job, however, was completed, although not approved, it was otherwise, and the loss was to be borne by the employer.[4] Pothier seems, however, to hold a different opinion; and to insist, that, in the case of hiring by the job for a specified price, if the thing perishes by accident, and without any default of the workman, before it is completed, he is entitled to a compensation *pro tanto* for his work and labor already done, and materials found.[5]

§ 426 *c*. By the Roman law also, if the workman has been at any charge in securing or preserving the thing on which the work is done, beyond what by his undertaking is to be borne by himself, he is entitled to a compensation therefor.[6] The common law, in a case of clear necessity, would probably adopt the like rule, as a fair presumption of the intention of the parties. Thus, if the thing were carried away by an inundation, the expenses of recovering it would be deemed a fair charge on the bailor.[7]

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[1] Post, § 427 a; 1 Bell, Comm. p. 456, 5th edit.

[2] Ante, § 426.

[3] Dig. Lib. 19, tit. 2, l. 36; Pothier, Pand. Lib. 19, tit. 2, n. 68; Id. n. 23.

[4] Dig. Lib. 19, tit. 2, l. 36; Pothier, Pand. Lib. 19, tit. 2, l. 68.

[5] Pothier, Contrat de Louage, n. 433.

[6] 1 Domat, B. 1, tit. 4, § 9, art. 8; Dig. Lib. 19, tit. 2, l. 55, § 1.

[7] Story on Agency, § 142, 335, 336, 337.

§ 427. But although, upon the general principles of law applicable to the contract of hire, if the thing perishes while it is yet in the hands of the workman, and before the work is completed, without any default on his part, he is entitled (as we have seen) to compensation for his labor; yet it must be admitted, that the rule has not obtained universal favor.[1] On the contrary, it has been maintained by very able writers, that wherever the subject-matter perishes by accident before the same is completed, or before it is delivered to the employer, it will perish to the workman and employer respectively, so that neither can recover any thing from the other.[2] The modern code of France declares, that in such a case there shall be no compensation to the workman; but that the thing perishes to the loss of the employer and the workman respectively,[3] unless the thing has perished through the fault of the material.[4] The Code of Louisiana adopts the same rule.[5]

§ 427 *a*. On the other hand, where the workman is to furnish the materials, as well as the work, if the thing happen to perish before it is completed and delivered to the employer, in whatever manner the loss may be, whether it be by inevitable accident, or irresistible violence, or otherwise than by the default of the employer himself, the loss is to be borne by the workman; for in such a case he is deemed the owner of the thing; and *res perit domino*.[6] However, all these doctrines prevail only in the absence of any contrary stipulations of the parties, who may by their contract vary and control the ordinary results of the law.[7]

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[1] See 1 Bell, Comm. § 302, 4th edit.; 1 Bell, Comm. p. 456, 5th edit.

[2] 1 Bell, Comm. p. 456, 5th edit.; 1 Bell, Comm. § 392, 4th edit.; 2 Kent, Comm. Lect. 40, p. 590, 591, 4th edit.

[3] Code Civil of France, art. 1790; 2 Pardes. Droit Commer. P. 2, tit. 7, ch. 2, art. 526; 1 Bell, Comm. 456, 5th edit.; 1 Bell, Comm. § 390, 4th edit.; 2 Kent, Comm. Lect. 40, p. 591, 4th edit.

[4] Code Civil of France, art. 1790.

[5] Code of Louisiana of 1825, art. 2730, 2731. See also, 1 Bell, Comm. § 392, 4th edit.; 1 Bell, Comm. p. 456, 5th edit.

[6] Code Civil of France, art. 1788; Code of Louisiana, art. 2729; Pothier, Contrat de Louage, n. 394.

[7] Pothier, Contrat de Louage, n. 428, 429; Dig. Lib. 19, tit. 2, l. 13, § 5; 1

§ 428. The obligations or duties on the part of the workman or undertaker are thus summed up in the foreign law: to do the work; to do it at the time agreed on; to do it well; to employ the materials furnished by the employer in a proper manner; and, lastly, to exercise the proper degree of care and diligence about the work.[1] Upon most of these particulars a few words will suffice. In regard to the obligation to do the work, it may be generally stated, that it will be sufficient, if the undertaker does the work by the means of other persons, or sub-agents, if the work be such as may ordinarily be done by others in an equally satisfactory manner. But where the work is one of art, in the execution of which the genius, talent, and skill of the particular artist may fairly be presumed to be contracted for, such, for example, as with a painter to paint a ceiling or a portrait, he is not allowed to substitute another person, without the consent of the employer.[2] In respect to the time when the work is to be finished, the duty is in general imperative; and if not finished within the time, the employer is entitled to recover his damages for the non-execution.[3] And the time need not in all cases be expressly stipulated; it is sufficient, if it may be reasonably inferred from the nature of the contract.[4] Thus, if the contract is to build a hut or stall for an approaching fair, the work is necessarily understood to be finished in season for the fair.[5] In respect to the manner of doing the work, it is obvious, that, if it be badly or unskilfully done, or with improper materials, the undertaker ought to be liable for all damages. For he undertakes for reasonable skill in planning and in execution. *Spondet peritiam artis; Imperitia culpæ adnumeratur.*[6] And in such a case it is wholly immaterial

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Bell, Comm. p. 458, 5th edit.; 1 Domat, B. 1, tit. 4, § 7, art. 3; Id. § 8, art. 10; Pothier, Pand. Lib. 19, tit. 2, n. 33, 35.

[1] Pothier, Contrat de Louage, n. 419 to 433; 2 Pardes. Droit Commer. P. 2, art. 523 to 525, and 528.

[2] Pothier, Contrat de Louage, n. 420, 421.

[3] Pothier, Contrat de Louage, n. 423, 424.

[4] Pothier, Contrat de Louage, n. 424.

[5] Pothier, Contrat de Louage, n. 424.

[6] Pothier, Contrat de Louage, n. 425, 427, 428; Dig. Lib. 50, tit. 17, l. 132; 2 Kent, Comm. Lect. 40, p. 588, 589, 4th edit.; 1 Domat, B. 1, tit. 4, § 8, art. 1; Post, § 431.

whether the defects in the execution of the work have arisen from the fault of the undertaker himself, or from the fault of the persons employed by him; or whether the materials have been unskilfully used, or have been spoiled, so as to be unfit for the use intended.[1]

§ 428 *a*. On the other hand, if the loss or bad execution is not properly attributable to the fault or unskilfulness of the undertaker, or of those employed by him, but arises from the inherent defect of the thing itself, in such a case the loss is to be borne by the employer, unless there is some agreement, by which the risk is taken by the undertaker.[2] The Roman law fully recognized the same doctrine, and applied it to the case, where a gem in being set or engraved was broken from some intrinsic defect. *Si gemma includenda aut insculpenda data sit, eaque fracta sit; siquidem vitio materiæ factum sit, non erit ex locato actio; si imperitia facientis, erit. Huic sententiæ addendum est, nisi periculum quoque in se artifex receperat; tunc enim, etsi vitio materiæ id evenit, erit ex locato actio.*[3] It does not seem necessary further to enlarge on these heads; and we shall therefore proceed to the consideration of the degree of care and diligence required of the undertaker.

§ 429. What, then, is the degree of care or diligence for which bailees of work for hire are responsible? The general rule is (as has been often observed), that where the contract is of mutual benefit, there ordinary diligence only is required.[4] And this is the degree of diligence, therefore, which applies to contracts of this sort, as well by the common law as by the Roman and foreign law.[5] Thus, a watchmaker having a

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[1] Pothier, Contrat de Louage, n. 428; 1 Domat, B. 1, tit. 4, § 8, art. 1, 2, 3, 7; Duncan *v.* Blundell, 3 Stark. R. 6; 1 Bell, Comm. p. 458, 5th edit.; 1 Bell, Comm. § 394, 4th edit.; Dig. Lib. 50, tit. 17, l. 132; Dig. Lib. 19, tit. 2, l. 25, § 7; Pothier, Pand. Lib. 19, tit. 2, n. 32.

[2] Pothier, Contrat de Louage, n. 428; 2 Kent, Comm. Lect. 40, p. 588, 589, 4th edit.

[3] Dig. Lib. 19, tit. 2, l. 13, § 5; Pothier, Pand. Lib. 19, tit. 2, n. 35; Pothier, Contrat de Louage, n. 428; 2 Kent, Comm. Lect. 40, p. 587, 588, 589, 4th edit.; 1 Domat, B. 1, tit. 4, § 8, art. 4, 8, 9; Post, § 432.

[4] Ante, § 23.

[5] Ante, § 398; Jones on Bailm. 91, 94; Pothier, Contrat de Louage, n. 429;

watch left with him for repairs, is obliged to use ordinary diligence in keeping it; and if he omits it, and the watch is lost, he is liable for the value in damages.[1] So, a workman is bound, not only to guard the thing bailed against ordinary hazards, but also to exert himself to preserve it from any unexpected danger to which it may be exposed.[2] It has been already observed, that different things may require very different care.[3] The care required in building a common door-way is quite different from that required in raising a marble pillar, although both might come under the description of ordinary care.[4]

§ 430. Pothier maintains, that, in cases of theft, the bailee of work is liable to his employer for the loss of the thing. It is probable, that he holds this doctrine upon the general ground of the Roman law, that it is presumptive evidence of ordinary negligence.[5] It has been already seen, that at the common law the rule is different; for whether the bailee will in such a case be liable or not, for the loss, will depend, not upon the mere fact of theft, but upon the question whether the loss has been occasioned by the want of ordinary care, that is to say, by the ordinary negligence of the bailee.[6]

§ 431. Where skill, as well as care, is required in performing the undertaking, there, if the party purports to have skill in the business, and he undertakes for hire, he is bound, not only to ordinary care and diligence in securing and preserving the thing, but also to the exercise of due and ordinary skill in the employment of his art or business about it; or, in other words, he undertakes to perform it in a workmanlike manner.[7]

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1 Domat, B. 1, tit. 4, § 8, art. 3; 2 Kent, Comm. Lect. 40, p. 457, 458, 4th edit.; 1 Bell, Comm. 453, 455, 5th edit.; Id. § 389, 390, 4th edit.

[1] Clarke *v.* Earnshaw, 1 Gow, R. 30.

[2] Leck *v.* Maestaer, 1 Camp. R. 138.

[3] Ante, § 15.

[4] 1 Bell, Comm. p. 458, 5th edit.; 1 Bell, Comm. § 394, 4th edit.

[5] Pothier, Contrat de Louage, n. 429, 430, 431; Ante, § 38, 39, 339 to 339; 1 Domat, B. 1, tit. 4, § 8, art. 3.

[6] Ante, § 38, 39, 333 to 339.

[7] Jones on Bailm. 91; 2 Kent, Comm. Lect. 40, p. 586, 587, 588, 4th edit.; 1 Bell, Comm. 459.

In cases of this sort he must be understood to have engaged to use a degree of diligence and attention and skill, adequate to the due performance of his undertaking.[1] And if he has not the proper skill, or if, having it, he omits to use it, or if he omits in other respects the proper degree of diligence and attention required for the work, he will be responsible for the damages sustained thereby by his employer.[2] The general maxim is: *Spondet peritiam artis.*[3] *Imperitia culpæ adnumeratur.*[4] It is the party's own fault, if he undertakes without having sufficient skill, or if he applies less than the occasion requires. And it has been well observed, that, where a person is employed in a work of skill, the employer buys both his labor and his judgment. He ought not to undertake the work, if he cannot succeed; and he should know whether he can or not.[5] Thus, if a farrier undertakes the cure of a diseased or lame horse, he is bound to apply a reasonable exercise of skill to the cure; and if through his ignorance or bad management the horse dies, he will be liable for the loss.[6] So, if a ship-carpenter undertakes to build a ship, he engages for the exercise of reasonable skill, as well as proper care in building it; and he will be liable for any loss or injury sustained by his employer by his negligence or want of skill.[7]

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[1] Jones on Bailm. 22, 53, 62, 97, 98, 120, 121; Coggs *v.* Bernard, 2 Ld. Raym. 909, 918; Moneypenny *v.* Hartland, 1 Carr. & Payne, 352; s. c. 2 Carr. & Payne, 378; 1 Domat, B. 1, tit. 4, § 8, art. 1; Pothier, Contrat de Louage, n. 425.

[2] 1 Bell, Comm. p. 456, 5th edit.; 1 Bell, Comm. § 393, 4th edit.

[3] Jones on Bailm. 23, note (*m*); Id. 98, note (*l*); Pothier, Contrat de Louage, n. 425 to 428; Pardes Droit Comm. P. 2, art. 528; Ayliffe, Pand. B. 4, tit. 7, p. 466; Ersk. Inst. B. 3, tit. 3, § 16; 1 Bell, Comm. p. 459, 5th edit.; 1 Bell, Comm. § 394, 4th edit.

[4] Dig. Lib. 50, tit. 17, l. 132; Ante, § 428; Dig. Lib. 4, tit. 9, l. 5; Dig. Lib. 19, tit. 2, l. 9, § 5; Pothier, Pand. Lib. 19, tit. 2, n. 29; 2 Kent, Comm. Lect. 40, p. 588, 4th edit.; Pothier, Contrat de Louage, n. 425; Jones on Bailm. p. 98; 1 Domat, B. 1, tit. 16, § 204.

[5] Duncan *v.* Blundell, 3 Stark. R. 6; Moneypenny *v.* Hartland, 1 Carr. & Payne, 352; s. c. 2 Carr. & Payne, 378.

[6] Jones on Bailm. 62, 99, 100; 1 Roll. Abr. 10; 1 Bell, Comm. p. 459, 461, 5th edit.; 1 Bell, Comm. § 394, 4th edit.

[7] Pothier, Pand. Lib. 19, tit. 2, n. 29.

So, if a person employs a proper mechanic or artisan to erect a stove in a shop, and lay a tube under the floor for the purpose of carrying off the smoke, and the plan should fail, the workman will not be entitled to any compensation; and if damages are sustained, he will be liable therefor.[1] Of course, this doctrine is subject to the exception, that the undertaker is permitted to act upon his own judgment; for if his employer chooses to supersede the judgment of the undertaker, and requires his own to be followed, he must not only bear the loss, but pay the full compensation.[2] The Roman law states the general doctrine as to the exercise of due skill in the following broad terms: *Si quis vitulos pascendos, vel sarciendum quid, poliendumve conduxit, culpam eam præstare debere; et quod imperitiâ peccavit, culpam esse, quippe ut artifex conduxit.*[3]

§ 432. The degree of skill and diligence which is required rises also in proportion to the value, the delicacy, and the difficulty of the operation.[4] Thus, an artisan, employed to repair a very delicate mathematical instrument, is expected to exert more care and more skill than he would about common instruments. The case put by Gaius is of this nature. The removal or raising of a fine pillar of granite or porphyry, without injuring the shaft or the capital, requires peculiar care and skill; and the law exacts, therefore, more than ordinary diligence and skill in the undertaker of such a work for a stipulated compensation, that is, more diligence and skill than are required of workmen in removing ordinary things of the same material.[5] But, if all things are done by the undertaker, which a very diligent and skilful workman would observe, and there is no negligence, he will be exonerated, although the column should be fractured.[6] The language of

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[1] Duncan *v.* Blundell, 3 Stark. R. 6; Farnsworth *v.* Garrard, 1 Camp. R. 39; Moneypenny *v.* Hartland, 1 Carr. & Payne, 352; 2 Carr. & Payne, 378.

[2] Duncan *v.* Blundell, 3 Stark. R. 6.

[3] Dig. Lib. 19, tit. 2, l. 9, § 5; Pothier, Pand. Lib. 19, tit. 2, n. 29.

[4] Ante, § 15; Jones on Bailm. p. 38, 39.

[5] Jones on Bailm. 98; Dig. Lib. 19, tit. 2, l. 25, § 7; 2 Kent, Comm. Lect. 40, p. 587, 4th edit.

[6] Jones on Bailm. 98; Dig. Lib. 19, tit. 2, l. 25, § 7; Id. l. 15, § 5; Ante,

Gaius is: *Qui columnam transportandam conduxit, si ea dum tollitur, aut portatur, aut reponitur, fracta sit, ita id periculum præstat, si quâ ipsius eorumque, quorum opera uteretur, culpa acciderit. Culpa autem abest, si omnia facta sunt, quæ diligentissimus quisque observaturus fuisset.*[1] So (as we have seen),[2] if a gem is delivered to a jeweller to be set or engraved, and it is broken; if this arises solely from the defect of the material, the jeweller is not responsible. But it is otherwise, if it arises from the unskilfulness, or negligence, or rashness of the artisan.[3] So, if clothes are delivered to a fuller to be dressed, and he suffers them to be eaten by mice, he will be responsible, if it is by his negligence. The Roman law imputed negligence to him in such a case. *Si fullo vestimenta polienda acceperit, eaque mures roserint, ex locato tenetur; quia debuit ab hac re cavere.*[4]

§ 433. But in all these cases, where skill is required, it is to be understood, that it means ordinary skill in the particular business or employment which the bailee undertakes, or in which he is engaged. For he is not presumed to engage for extraordinary skill, which may belong to a few men only in his business or employment, or for extraordinary personal endowments or acquirements. Reasonable skill constitutes the measure of the engagement of the workman in regard to the thing undertaken.[5]

§ 434. Sir William Jones, however, while he admits the

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§ 428 *a*; Ayliffe, Pand. B. 4, tit. 7, p. 463. Mr. Bell in his Commentaries, has laid down some rules on the subject of professional skill, which may assist the learned inquirer in his efforts to arrive at a just criterion. 1 Bell, Comm. § 394, 4th edit.; 1 Bell, Comm. p. 459, 460, 5th edit.

[1] Dig. Lib. 19, tit. 2, l. 25, § 7.

[2] Ante, § 428.

[3] Dig. Lib. 19, tit. 2, l. 13, § 5; Pothier, Contrat de Louage, n. 428.

[4] Dig. Lib. 19, tit. 2, l. 13, § 6; Pothier, Pand. Lib. 19, tit. 2, n. 29; Dig. Lib. 4, tit. 9, l. 5; Jones on Bailm. 105; 2 Kent, Comm. Lect. 40, p. 587, 588, 589, 4th edit.; 1 Domat, B. 1, tit. 4, § 8, art. 3. We have already seen, that our law is or may be different; for if ordinary precautions are used, and the clothes are eaten by mice, the bailee would not be responsible. Ante, § 408.

[5] Moore *v.* Morgue, Cowp. R. 479; Jones on Bailm. 94; 1 Bell, Comm. p. 458, 459, 5th edit.; 1 Bell, Comm. § 394, 4th edit.

general rule, seems to intimate in one place a more stringent doctrine. "When," says he, "a person, who, if he were wholly uninterested, would be a mandatary, undertakes for a reward to perform any work, he must be considered as bound still more strongly to use a degree of diligence adequate to the performance of it. His obligation must be rigorously construed; and he would perhaps be answerable for slight neglect, where no more would be required of a mandatary than ordinary exertions."[1] And he adds: "This is the case of commissioners, factors, and bailiffs, when their undertaking lies in feasance, and not simply in custody."[2] Now, this seems inconsistent with the general principles applicable to bailments to hire. In such cases the bailee is liable only for ordinary neglect, and not for slight neglect; for ordinary neglect of skill, and not for slight neglect of skill. In short, as a workman, he undertakes for the ordinary diligence of a workman in business of that sort; and he is responsible only for the omission of it.[3] The very case put by Sir William Jones, of commission merchant, factors, and bailiffs, when their undertaking lies in feasance,[4] shows his mistake; for it is clear, that they are responsible only for ordinary diligence and skill.[5] Sir William Jones may have been misled by considering, that, as the rule of the Roman law, as well as that of the common law, makes the bailee answerable for a skill in his business adequate to the undertaking, he is answerable at all events, if there is the slightest negligence in applying that skill. Whereas, in truth, he is only answerable if he is guilty of ordinary negligence in applying it. Domat seems to have adopted a similar mode of reasoning; and Pothier probably means to assert the same doctrine.[6]

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[1] Jones on Bailm. 98.

[2] Ibid.

[3] 2 Kent, Comm. Lect. 40, p. 586, 587, 588, 589, 4th edit.; 1 Bell, Comm. p. 459, 460, 461, 5th edit.; 1 Bell, Comm. § 394, 4th edit.

[4] Jones on Bailm. 98.

[5] Russel *v.* Palmer, 2 Wils. R. 325; Denew *v.* Daverell, 3 Camp. R. 451; Shiells *v.* Blackburne, 1 H. Black. 159; Seare *v.* Prentice, 8 East, R. 348.

[6] 1 Domat, B. 1, tit. 4, § 8, art. 3; Pothier, Contrat de Louage, n. 425 to 428.

§ 435. But even where the particular business or employment requires skill, if the bailee is known not to possess it, or he does not exercise the particular art or employment to which it belongs, and he makes no pretension to skill in it; there, if the bailor, with full notice, trusts him with the undertaking, the bailee is bound only for a reasonable exercise of the skill which he possesses, or of the judgment which he can employ; and if any loss ensues from his want of due skill, he is not chargeable.[1] Thus (to put a case borrowed from the Mahometan law) if a person will knowingly employ a common matmaker to weave or embroider a fine carpet, he must impute the bad workmanship to his own folly.[2] So, if a man, who has a disorder in his eyes, should employ a farrier to cure the disease, and he should lose his sight by using the remedies prescribed in such cases for horses, he would certainly have no legal ground of complaint.[3] Indeed, in all such cases, the employer ought properly to attribute the loss or injury to his own rashness, or folly, or supine negligence; and the rule of the Roman law may justly be applied: *Qui negligenti amico rem custodiendam committat, de se queri debet;*[4] *non ei, sed suæ facilitati, id imputare debet.*[5]

§ 436. In cases of the hire of work, the hirer is liable, not only for misfeasance, but also for nonfeasance; and in this respect the contract differs from that of a mere gratuitous mandatary.[6] The reason is, that in case of hire there is a mutuality of consideration to support the contract; and therefore the party is bound to a positive fulfilment of all its terms; whereas in cases of a gratuitous mandate, the mandatary can-

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[1] Jones on Bailm. 63, 98, 99, 100; Coggs *v.* Bernard, 2 Ld. Raym. 909, 914, 915; 1 Bell, Comm. p. 459, 5th edit.; 1 Bell, Comm. § 394, 4th edit.

[2] Jones on Bailm. 99, 100.

[3] Jones on Bailm. 99, 100; Ante, § 2, *sub finem*, note (2); Ante, § 169 to 172; Beauchamp *v.* Powley, 1 Mood. & Rob. 38.

[4] Dig. Lib. 44, tit. 7, l. 1, § 5.

[5] Just. Inst. Lib. 3, tit. 15, § 3; Ante, § 63.

[6] Jones on Bailm. 101; 3 Bl. Comm. 157; Elsee *v.* Gatward, 5 Term R. 143; Thorne *v.* Deas, 4 Johns. R. 84.

not be compelled to execute his undertaking, if he has not already entered upon the execution of it.[1]

§ 437. From what has been before said, it follows, that a workman is not chargeable, if the thing perishes while in his custody, without his default, either by inevitable casualty, or by internal defect, or by superior force, or by robbery, or by any other peril, not to be guarded against by ordinary diligence;[2] unless, indeed, he has taken such risks upon himself by a special contract.[3]

§ 438. And here it may not be unimportant again to take notice of the distinction, already alluded to,[4] between cases where the workman is to make a thing out of materials, owned by his employer, and cases where he is to make it out of his own materials. In the former cases, if the thing perishes without his default, before it is completed or delivered to his employer, he is, or he may be, entitled (as we have seen) to a compensation to the extent of his work actually done.[5] But in the latter cases the whole loss is his own, if the thing perishes before a delivery of it to his employer, and he is entitled to no recompense.[6] In each case, however, the same rule of law applies: *Res perit domino.* The only difference is, that in the one case the employer is the owner; and in the other, the workman. In the first case, it is a mere bailment; in the last, it is the sale of a thing *in futuro*.[7]

§ 439. The distinction, too, between cases of *mutuum* and cases of bailment on hire, deserves mention in this place, although much of what would probably apply here has been

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[1] Ante, § 2, *sub finem*, note (2); Ante, § 164 to 172; Beauchamp *v.* Powley, 1 Mood. & Rob. 38; Callendar *v.* Oelricks, 1 Arnold, R. 401, 404.

[2] Jones on Bailm. 88, 98, 119, 120; Pothier, Contrat de Louage, n. 428; Id. n. 434; Pard. Droit Comm. P. 2, art. 526; 1 Domat, B. 1, tit. 4, § 8, art. 4, 9; Code Civil of France, art. 1789, 1792.

[3] Ante, § 426, 427, 428; Pothier, Contrat de Louage, n. 428.

[4] Ante, § 427 *a*.

[5] Ante, § 526, 427 *a*; 1 Domat, B. 1, tit. 4, § 8, art. 4, 9; Pothier, Contrat de Louage, n. 434; 1 Bell, Comm. p. 458, 5th edit.; 1 Bell, Comm. § 394, 4th edit.

[6] Ante, § 427 *a*.

[7] 1 Domat, B. 1, tit. 4, § 7, art. 3; Id. § 8, art. 10; Ante, § 427, 427 *a*.

already suggested under the preceding remarks, as well as under the head of gratuitous loans.[1] The distinction between the obligation to restore the specific things, and the obligation to return other things of the like kind, and equal in value, holds in cases of hiring as well as in cases of deposits and gratuitous loans.[2] In the former cases, it is a regular bailment; in the latter, it becomes a debt or innominate contract.[3] Thus, according to the famous law of Alfenus, in the Digest (already incidentally referred to),[4] if an ingot of silver is delivered to a silversmith to make an urn, the whole property is transferred, and the employer is only a creditor of metal equally valuable, which the workman engages to pay in a certain shape, unless it is agreed that the specific silver, and none other, shall be wrought up into the urn.[5] So, where A delivered to B some cotton yarn, on a contract to manufacture the same into cotton plaids, and B was to find the filling, and was to weave so many yards of plaids, at eighteen cents per yard, as was equal to the value of the yarn at sixty-five cents per pound, it was held to be a sale of the yarn, and that by the delivery of it to B it became his property, and he was responsible for the delivery of the plaids, notwithstanding the loss of the yarn by an accidental fire.[6] But if A and B had agreed to have the particular yarn, with filling to be found by B, made into plaids on joint account, and the plaids, when woven, were to be divided according to their respective interests in the value of the materials, and the plaids, before the division, had been burnt by an accidental fire, the loss would have been (it should seem) mutual, each losing the materials furnished by himself.[7]

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[1] Ante, § 47, 228, 283, 370 *a*, 415 *a*.

[2] Pothier, Traité de Dépôt, n. 82; Jones on Bailm. 82; Ante, § 370 *a*.

[3] Jones on Bailm. 102; Ante, § 228, 283, 370 *a*.

[4] Ante, § 370 *a*, 415 *a*.

[5] Ante, § 370 *a*, 415 *a*; Jones on Bailm. 102; Id. 64; Dig. Lib. 19, tit. 2, l. 31; Ersk. Inst. B. 3, tit. 1, § 18; 1 Domat, B. 1, tit. 4, § 1, art. 4; 2 Kent, Comm. Lect. 40, p. 588, 589, 4th edit. See Chase *v.* Washburn, 1 Ohio St. R. (McCook), 249.

[6] Buffum *v.* Merry, 3 Mason, R. 478.

[7] Ibid. See also, Pierce *v.* Schenck, 3 Hill, R. 28; Barker *v.* Roberts, 8 Greenl. R. 101; Ante, § 228, 283.

§ 440. There are some other obligations implied on behalf of the bailee of work on the thing. Among these is the duty of observing good faith, and practising no fraud, deceit, or imposition on his employer, either as to the quality, or quantity, or nature of his services.[1] He is also bound to conform to all the special stipulations, which constitute a part of the contract.[2] When the work is done, he is bound to return the thing in good order to his employer. But this duty of returning the thing requires some qualification. For every bailee for hire has a lien on the thing for the amount of his compensation; and therefore he is not, unless it is specially otherwise agreed, bound to restore the thing bailed, until that compensation is paid.[3] Thus a tailor, who has made a suit of garments out of the cloth delivered to him, is not bound to deliver the suit to his employer, until he is paid for his services. Neither is a ship-carpenter bound to restore the ship which he has repaired; nor a jeweller the gem which he has set, or the seal which he has engraved; nor on agistor, the horse which he has taken on hire: until their respective compensations are paid.[4] But this lien of a workman belongs strictly to the person contracting to do the work or services and not to the persons employed under him.[5] The lien, too, in case of a sale of the thing by the owner, attaches only to the amount of the debt existing in favor of the party at the time when he has notice of the sale, and not for any after-accruing debt.[6]

§ 441. Questions of a very embarrassing nature sometimes arise upon contracts of hire at the common law; as, for instance, how far a workman is entitled to receive compensation, when his work has been left unfinished and incomplete; or he has done it improperly; or he has deviated from the directions

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[1] Pothier, Contrat de Louage, n. 432.

[2] Pothier, Contrat de Louage, n. 433; Pothier, Pand. Lib. 19, tit. 2, n. 35.

[3] McIntyre v. Carver, 2 Watts & Serg. 392; Gregory v. Stryker, 2 Denio, R. 628; Morgan v. Congdon, 4 Comst. 551; Nevan v. Roup, 8 Iowa, 211.

[4] 2 Roll. Abridg. 92, M. 1; Blake v. Nicholson, 3 Maule & Selw. 167; Chase v. Westmore, 5 Maule & Selw. 180; Ex parte Deese, 1 Atk. R. 228.

[5] Hollingsworth v. Dow, 19 Pick. R. 228.

[6] Barry v. Longmore, 4 Perry & Dav. 344.

of his employer. The question may arise under a general contract of hire, or under a special contract. It may arise where the contract is yet executory and open, or where the work has been finished, and the contract executed. Where the work is done under a general contract of hire, if it is badly and improperly done, the workman will be entitled to recover nothing in case it totally fails of being of any use or value, or is wholly inadequate to the purpose for which it was designed. But if it has some use or value, although imperfectly or inartificially done, the workman is entitled to recover as much as the labor, services, and materials are reasonably worth, under all the circumstances.[1] Where the work is left unfinished and incomplete, by the wilful neglect or wanton refusal of the workman to complete it, if it has been undertaken to be done by the job, and so the contract is entire, he cannot recover any thing.[2] And if he works by the day, he is at most entitled to no compensation beyond what remains after deducting all damages which the employer may have suffered by his omission or refusal. If the work is prevented from being completed by inevitable accident, the workman will be entitled to receive compensation *pro tanto*, as we have already seen.[3] If he is prevented from completing it by the act or negligence of the employer, he will be entitled to a full compensation.[4]

§ 441 *a*. On the other hand, if the work has been done under a special contract, according to the general rule of the common law, no compensation can be recovered under that contract, unless all the terms and stipulations thereof have been exactly complied with and fulfilled.[5] Thus, if a carpenter

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[1] Farnsworth *v.* Garrard, 1 Camp. R. 38; Basten *v.* Butter, 7 East, R. 479; Cutler *v.* Close, 5 Carr. & Payne, 337; Thornton *v.* Place, 1 Mood. & Rob. 218; Grant *v.* Button, 14 Johns. R. 377.

[2] Sinclair *v.* Bowles, 9 Barn. & Cress. 92; Faxon *v.* Mansfield, 2 Mass. R. 147.

[3] Ante, § 426, 437.

[4] Post, § 441 *a*; Dubois *v.* Del. & Hudson Canal Co. 4 Wend. R. 285; 1 Bell, Comm. p. 456, 5th edit.; 1 Bell, Comm. § 391, 393, 4th edit.

[5] Ellis *v.* Hamlen, 3 Taunt. R. 52; Jennings *v.* Camp, 13 Johns. R. 94; McMillan *v.* Vanderlip, 12 Johns. R. 165; Cutter *v.* Powell, 6 Term R. 320; Thornton *v.* Place, 1 Mood. & Rob. 218; Cooke *v.* Munstone, 4 Bos. & Pull. 335; 1 Bell, Comm. p. 456, 5th edit.; Id. § 391, 393, 4th edit.

has undertaken to erect a house according to a particular plan, and for a specified price, and by his own default he does not complete the work; or if he deviates from the plan, or he does the work unfaithfully, unskilfully, or improperly, he cannot recover under the special contract.[1] If the work is not completed, he is not entitled to recover any thing; because the special contract is yet open and unexecuted, and he cannot avail himself of his own default or misconduct, to rescind it.[2] If he has deviated from the plan or contract, or he has done the work unskilfully or improperly, he cannot recover; because such a deviation or misconduct in the work is not a fulfilment, but is a violation, of the contract, entitling the employer to damages.

§ 441 *b*. And formerly it seems to have been thought that, under any of these circumstances, the workman was not entitled to recover any compensation whatsoever in any other form of action, or upon a *quantum meruit*.[3] But the doctrines and distinctions now maintained by the better authorities are these. If the special contract still remains open, and is unexecuted by the misconduct or default of the workman, he cannot recover any thing for his work and labor and materials employed in part fulfilment of the contract.[4] If the contract has been rescinded by the parties, or the work has not been completed from inevitable accident, and is incapable of being completed, or if the employer has prevented or dispensed with the due execution thereof, the workman is entitled, in the former case, to a compensation *pro tanto* for the work done, unless there is something in his contract which prevents it;[5] and in the latter

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[1] Ellis *v*. Hamlen, 3 Taunt. R. 52; Cousins *v*. Paddon, 2 Cromp. Mees. & Rosc. 547; Burn *v*. Miller, 4 Taunt. R. 745, 747; Taft *v*. Montague, 14 Mass. R. 282; Jewell *v*. Schroeppel, 4 Cowen, R. 564; Sickels *v*. Pattison, 14 Wend. R. 257.

[2] Jennings *v*. Camp, 13 Johns. R. 94.

[3] Ellis *v*. Hamlen, 3 Taunt. R. 53.

[4] Sinclair *v*. Bowles, 9 Barn. & Cress. 92; Clarke *v*. Smith, 14 Johns. R. 326; Raymond *v*. Bearnard, 12 Johns. R. 274; Jennings *v*. Camp, 13 Johns. R. 94; Faxon *v*. Mansfield, 2 Mass. R. 147; McMillan *v*. Vanderlip, 12 Johns. R. 165; Champlin *v*. Butler, 18 Johns. R. 169.

[5] Ante, § 426, 437; Robson *v*. Godfrey, 1 Starkie, R. 275; Raymond *v*. Bearnard, 12 Johns. R. 274; Dubois *v*. Del. & Hudson Canal Co. 4 Wend. R. 285.

case, to a full compensation on account of the default on the other side.[1] If the work has been done, and fully completed, but not according to the terms of the special contract, as if there has been a deviation from the plan or contract, or a bad and improper execution thereof, or the work has not been completed within the stipulated time, there the workman will be entitled to recover compensation, or not, according to circumstances. If the work has been so improperly and unskilfully done, that it is of no use, benefit, or value to the employer, or does not in any manner whatsoever answer the intended purpose, no compensation whatsoever is recoverable.[2] But if the work, although improperly or unskilfully done, is still of some use, benefit, and value to the employer, the workman will be entitled to recover so much as the work is reasonably worth to the employer, under all the circumstances, making him all due and reasonable deductions and allowances.[3] If the work has been well and properly done, but not within the stipulated time, the workman will, in like manner, be entitled to the compensation stipulated in the contract, making to the employer all due deductions and allowances for any damage or loss occasioned by the delay.[4]

§ 441 *c*. In cases where there has been a deviation from the terms of the contract, by doing any extraordinary work, or by using materials of a superior quality or value, not contemplated by the contract, the undertaker will not be entitled to any compensation therefor, even if such extraordinary work

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[1] See Koon *v*. Greenman, 7 Wend. R. 121; Dubois *v*. Del. & Hudson Canal Co. 4 Wend. R. 285.

[2] Buller, Nisi Prius, 139; Farnsworth *v*. Garrard, 1 Camp. R. 38; Duncan *v*. Blundell, 3 Starkie, R. 6; Batten *v*. Butter, 7 East, R. 479; Linningdale *v*. Livingston, 10 Johns. R. 36; Jennings *v*. Camp, 13 Johns. R. 94, 97; Grant *v*. Button, 14 Johns. R. 377; Jewell *v*. Schroeppel, 4 Cowen, R. 564; Chapel *v*. Hickes, 2 Cromp. & Mees. 214; S. C. 2 Tyrw. 43; Cutler *v*. Close, 5 Carr. & Payne, 337; Thornton *v*. Place, 1 Mood. & Rob. 218; Taft *v*. Montague, 14 Mass. R. 282; Feeter *v*. Heath, 11 Wend. R. 477.

[3] Ibid.

[4] Jewell *v*. Schroeppel, 4 Cowen, R. 564. See Littler *v*. Holland, 3 Term R. 590; Phillips *v*. Rose, 8 Johns. R. 392; Dubois *v*. Del. & Hudson Canal Co. 4 Wend. R. 285.

or superior materials have greatly enhanced the value of the thing, and are for the benefit of the employer, unless they have been so done and used with his consent, or by his approval or acquiescence.[1] But if, in either case, the deviation from the contract was with the assent or the acquiescence of the employer, then the undertaker will be entitled to recover upon the original contract, so far as it can be traced, and has been followed, in the execution of the contract, and on a *quantum meruit* for the residue of his services.[2] If the work has, with the express assent or the acquiescence of the employer, been left incomplete, or the latter has knowingly dispensed with a perfect and skilful performance of it, in like manner a full compensation can be recovered by the undertaker.[3] Where work has been done on the property of the employer, it is sometimes difficult to deduce any just inference of such assent, or acquiescence, or dispensation with the terms of the original contract; because he is often compelled to use the thing as it is, with all its imperfections, especially if the work is done on a thing of an immovable nature.[4] But where the thing is of a movable nature, and may be rejected, if unsatisfactory, as, for example, a bureau, made out of a log of mahogany belonging to the employer, or a silver urn, made out of old silver furnished by the employer, there the receipt of the article without any objection may, in many cases, perhaps, furnish a just ground to presume a waiver of all objections, notwithstanding the unskilfulness or incompleteness of the workmanship.

§ 411 *d*. These doctrines of the common law do not seem

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[1] 1 Bell, Comm. p. 455, 456, 5th edit.; 1 Bell, Comm. § 391, 393, 4th edit.; Wilmot *v.* Smith, 3 Carr. & Payne, 453; Lovelock *v.* King, 1 Mood. & Rob. 60; Burn *v.* Miller, 4 Taunt. 745, 749.

[2] 1 Bell, Comm. p. 455, 456, 5th edit.; 1 Bell, Comm. § 391, 393, 4th edit.; Bank of Columbia *v.* Patterson, 7 Cranch, R. 299; s. c. 2 Peters, Cond. R. 501; Robson *v.* Godfrey, 1 Stark. R. 275; s. c. 1 Holt, R. 236; Pepper *v.* Burland, Peake, R. 103.

[3] Linningdale *v.* Livingston, 10 Johns. R. 36; Burn *v.* Miller, 4 Taunt. R. 745, 749; Dubois *v.* Del. & Hudson Canal Co. 4 Wend. R. 285; Hollinshead *v.* Mactier, 13 Wend. R. 276.

[4] 1 Bell, Comm. 456, 5th edit.

essentially to differ from those promulgated on the same subject in the Roman law and in the foreign law. By the Roman law, where the work was improperly done, or not done according to the contract in point of time, or otherwise, the employer was entitled to damages, or to a deduction *pro tanto* from the compensation.[1] Where the work was left undone or incomplete on account of some inevitable accident, which rendered the completion of the work impossible, the workman was held entitled to no compensation, and was excused from all damages for the non-performance.[2] We have already had occasion incidentally to notice the French law on this subject.[3] In Scotland, in all cases of unauthorized deviation from the contract, or of imperfect and improper execution of the work, the rule seems to be, that, balancing the inconvenience and damage arising from the imperfect or faulty performance against the benefit actually derived from the work, the workman is entitled to demand, or bound to make up, the difference.[4]

ART. III. HIRE OF CUSTODY.

§ 442. We are next led to the consideration of bailments of LOCATIO CUSTODIÆ, or Deposits for Hire. A contract of this sort may be properly deemed, as has been already stated, a hiring of care and attention.[5] St. German seems not to make any distinction, at least not in one part of his work, between a gratuitous depositary and a depositary for hire, as to the degree of diligence exacted of him.[6] But Sir William Jones, with great propriety, insists, that there is a wide difference between them; and that bailees of this sort, like other bailees

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[1] Dig. Lib. 19, tit. 2, l. 51, 58, 60; Pothier, Pand. Lib. 19, tit. 2, n. 24, 25, 26.

[2] Dig. Lib. 19, tit. 2, l. 15, § 6; Pothier, Pand. Lib. 19, tit. 2, n. 23, 68.

[3] Ante, § 426, 427, 437, 438; Pothier, Contrat de Louage, n. 433; Code Civil of France, art. 1789, 1790; Code of Louisiana of 1825, art. 2730, 2731.

[4] 1 Bell, Comm. p. 455, 456, 5th edit.

[5] Jones on Bailm. 96, 97; 1 Bell, Comm. p. 458, 5th edit.; 1 Bell, Comm. § 394, 4th edit.; Ante, § 370, 422.

[6] Doct. and Stud. Dial. 2, ch. 38.

upon a contract of mutual interest, are bound to ordinary diligence, and of course are responsible for losses by ordinary negligence.[1] To this class belong Agistors of Cattle, Warehouse-men, Forwarding Merchants, and Wharfingers, whose obligations would, therefore, seem to fall within the general rule.[2]

§ 443. (1) As to AGISTORS OF CATTLE, it has been decided, that they are within the general rule.[3] They do not insure the safety of the cattle agisted, but they are merely responsible for ordinary negligence.[4] It will, however, be such negligence for an agistor or his servants to leave open the gates of his field; and if, in consequence of such neglect, the cattle stray away, and are stolen, he will be responsible for the loss.[5] They have also, in virtue of their custody, such a possession and title, that they may maintain trespass or trover against a wrongdoer for any injury to their possession, or any conversion of the property.[6] By the Roman law the agistor was made responsible, not only for reasonable diligence, but for reasonable skill in his business, which, indeed, is also true in the common law; and ignorance of his proper duty is treated

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[1] Jones on Bailm. 87; 1 Bell, Comm. p. 458, 5th edit.; 1 Bell, Comm. § 394, 4th edit.

[2] Ante, § 91, 92, 443, 444, 451.

[3] Jones on Bailm. 91, 92.

[4] Jones on Bailm. 91, 92; Broadwater *v.* Blot, Holt, 547; 1 Bell, Comm. p. 458, 5th edit.; 1 Bell, Comm. § 394, 4th edit.

[5] Jones on Bailm. 92; 1 Bell, Comm. p. 458, 5th edit.; 1 Bell, Comm. § 394, 4th edit.

[6] 2 Roll. Abridg. 551; Sutton *v.* Buck, 2 Taunt. R. 309, *per* Chambre, J.; S. P. stated *arguendo* by counsel in Rooth *v.* Wilson, 1 Barn. & Ald. 59; 21 Hen. 7, 14 (b); Burton *v.* Hughes, 2 Bing. R. 173; 2 Black. Comm. p. 452, 453; 2 Saund. R. 47 *e*, note by Williams. An agistor of cattle has no lien for their keeping, except by special agreement. Goodrich *v.* Willard, 7 Gray, 183; Miller *v.* Marston, 35 Maine, 155; Grinnell *v.* Cook, 3 Hill, N. Y. R. 485. It seems that a livery-stable keeper has not. Jackson *v.* Cummins, 5 Mees. & Welsb. 350, 351; Miller *v.* Marston, 35 Maine, 154; Parsons *v.* Gingell, 4 Com. B. Rep. 545; Smith *v.* Dearlove, 6 Com. B. Rep. 132; Hickman *v.* Thomas, 16 Ala. 666. [But a trainer of race horses has a lien for his labor and skill. Forth *v.* Simpson, 13 Q. B. 680; Bevan *v.* Waters, 3 Car. & P. 520.]

as negligence. *Si quis vitulos pascendos conduxit, calpam eum præstare debere; et quod imperitia peccavit, culpam esse; quippe, ut artifex conduxit.*[1] The same rule prevails in the modern foreign law.[2]

§ 444. (2) As to WAREHOUSE-MEN, it is also clear, that they come within the general rule, and are bound only to take common and reasonable care of the commodity intrusted to their charge.[3] If, therefore, the commodity is injured or destroyed by rats, while in the custody of a warehouse-man, he is not responsible, if he has exercised ordinary care in preserving it.[4] So, warehouse-men are not liable for thefts, unless occasioned by their want of proper care,[5] and their care is not to be governed by that required of common carriers.[6] FORWARDING MERCHANTS are a class of persons well known in America, and usually combine in their business the double character of warehouse-men, and agents, for a compensation, to ship and forward goods to their destination. This class of persons is especially employed upon our canals and railroads, and in our coasting navigation by steam-vessels, and other packets.[7] Their liability is like that of warehouse-men, and common agents, and is governed by the general rule; and of course they are responsible for ordinary care, and skill, and diligence.[8] Hence it is,

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[1] Dig. Lib. 19, tit. 2, l. 9, § 5; Pothier, Pand. Lib. 19, tit. 2, n. 29.

[2] 1 Bell, Comm. § 394, 4th edit.; 1 Bell, Comm. p. 458, 459, 5th edit.

[3] Califf *v.* Danvers, Peake, R. 114; Finucane *v.* Small, 1 Esp. R. 315; Jones on Bailm. 49, 96, 97; Knapp *v.* Curtis, 9 Wend. R. 60; Foote *v.* Storrs, 2 Barbour, Sup. Ct. (N. Y.), R. 326; Cowles *v.* Pointer, 26 Miss. (4 Cushm.), 253.

[4] Califf *v.* Danvers, Peake, R. 114. See Ante, § 408; Post, § 513. [See White *v.* Humphery, 11 Q. B. 43. A warehouse-man, who is also a common carrier, and receives and stores goods in his warehouse for thirteen months, under an agreement to forward them upon order of the owner, at the customary rate of freight, and that in the mean time they should be kept without charge, is not a gratuitous bailee. Id.]

[5] See, as to want of ordinary care, Chenowith *v.* Dickinson, 8 B. Monroe, 156; Hatchett *v.* Gibson, 13 Ala. 587.

[6] Ibid.; Schmidt *v.* Blood, 9 Wend. R. 268; Ante, § 38, 39, 334, and note (2), § 410; Post, § 454.

[7] 2 Kent, Comm. Lect. 40, p. 591, 592, 4th edit.

[8] 2 Kent, Comm. Lect. 40, p. 591, 592, 4th edit.; Platt *v.* Hibbard, 7 Cowen,

that a person who receives goods in his own store, standing upon his own wharf, for the purpose of forwarding them, is deemed but a mere warehouse-man, and responsible for ordinary diligence only, even although he holds himself out to the public as ready and willing to take goods for persons generally, on storage, and to forward them to their destination.[1] And if, in such a case, his warehouse is broken open, and the goods stored are stolen therefrom by thieves, without any default on his part, or any want of ordinary care, he will not be responsible for the loss.[2]

§ 445. The most important practical question, which arises in respect to warehouse-men, is to ascertain when their liability, as such, begins and ends; or, in other words, when their duty of custody commences and finishes. It has been decided, that as soon as the goods arrive, and the crane of the warehouse is applied to raise them into the warehouse, the liability of the warehouse-man commences; and it is no defence, that they are afterwards injured by falling into the street from the breaking of the tackle, even if the carman who brought them has refused the offer of slings for further security.[3]

§ 446. But suppose (which is not an uncommon case), that a person acts both as a common carrier and as a warehouse-man; it may then, under some circumstances, become a matter of great nicety to decide in which character he is or may be chargeable for a loss which occurs; for, as the responsibilities of the two characters are very different, he may, in the character of carrier, be liable for a loss, from which he would be exempt in the other. A common carrier (as we

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R. 497; Streeter *v.* Horlock, 1 Bing. R. 34; Brown *v.* Denison, 2 Wend. R. 593; Forsythe *v.* Walker, 9 Barr, 148; Bush *v.* Miller, 13 Barbour, 488; Forward *v.* Pittard, 1 Term R. 27; Post, § 446; Hyde *v.* Trent Navigation Company, 5 Term R. 389. See Quiggin *v.* Duff, 1 Mees. & Welsb. 174; Powers *v.* Mitchell, 3 Hill, R. 545.

[1] Platt *v.* Hibbard, 7 Cowen, R. 497; Roberts *v.* Turner, 12 Johns. R. 232; Brown *v.* Denison, 2 Wend. R. 593.

[2] Platt *v.* Hibbard, 7 Cowen, R. 497. See Pothier, Pand. Lib. 19, tit. 2, n. 30.

[3] Thomas *v.* Day, 4 Esp. R. 262; De Mott *v.* Laraway, 14 Wend. R. 225; Randleson *v.* Murray, 8 Adolph. & Ellis, 109.

shall presently see) is liable for losses by fire not occasioned by inevitable casualty;[1] whereas a warehouse-man is not liable for any losses by fire, unless he has been guilty of ordinary negligence. An example to illustrate the distinction may be drawn from a case, which has actually passed into judgment. A common carrier from Stourpoint to Manchester, in England, undertook to carry goods from the former place to the latter, and to forward them from thence to Stockport. Upon arrival at Manchester, the goods were deposited in his warehouse, to await an opportunity of sending them on to Stockport by the Stockport carrier, there being none there at that time, by whom they could be sent on. Before the original carrier had an opportunity of forwarding them, they were destroyed by an accidental fire. And the question was, whether he was liable for the loss or not. It was held, that he was not liable; because his duty as carrier had terminated, and his duty as warehouse-man had commenced before the loss. It was not thought to make any difference in the case, that he received no distinct compensation as warehouse-man, but that there was an entire compensation for the whole services.[2] [So, in our own country, proprietors of a railroad who transport goods over their road, and deposit them in their warehouse without charge, until the owner or consignee has a reasonable time to take them away, have been held not liable, as common carriers, for the loss of the goods from the warehouse, but as depositaries, liable for want of ordinary care only.[3] The like rule has been laid down although the goods be destroyed by an accidental fire in the warehouse, before the owner or consignee has reasonable time to take them away.[4]]

§ 447. On the other hand, if the carrier's duty has not

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[1] Post, § 528, 536; Forward *v.* Pittard, 1 Term R. 27; 1 Bell, Comm. p. 464, 5th edit.

[2] Garside *v.* Trent and Mersey Navigation Company, 4 Term R. 581; 1 Bell, Comm. p. 464, 465, 5th edit.

[3] Thomas *v.* Boston & Providence Railroad Co. 10 Metcalf, R. 472; Smith *v.* Nashua & Lowell Railroad, 7 Foster, 91; Richards *v.* Michigan Southern Railroad, 20 Ill. R. 404.

[4] Norway Plains Co. *v.* Boston & Maine Railroad, 1 Gray, 263. But some

been completed at the time of the loss, he will be responsible therefor, if the loss be such as he would be responsible for as a mere carrier, notwithstanding he acts also as a warehouse-man in the same transaction. Thus, if the deposit in the warehouse of the carrier be at some intermediate place in the course of his own route;[1] or if, after the arrival at the place of destination, he is still bound as a carrier to deliver the goods to the owner, and before such delivery he has put them into his own warehouse for safe custody, where they are consumed by fire; he will, nevertheless, be liable for the loss.[2] In these and other like cases, which may easily be put, his proper duty as carrier not being ended, he is still considered as acting in the character of carrier, although he may make a distinct charge for warehouse room, and also for cartage of the goods, after their arrival at the place of destination, from the warehouse to the owner's house. And in such cases it will make no difference whether the warehouse rent and cartage are paid by the carrier to a third person, or are paid to the carrier himself for his personal account and profit; so, always, that the delivery of the goods to the owner, by the usage of the place, is a part of the proper duty of the carrier.[3]

§ 448. But when the goods have arrived at the place of their fixed destination, and are there deposited in the carrier's warehouse, to await the owner's convenience in sending for them, or for the purpose of being forwarded by some other carrier to another place; there his duty as carrier ends on the arrival of the goods at his (the carrier's) warehouse, and his duty as warehouse-man commences.[4] So, if, the carrier under-

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cases hold the carrier liable in such cases, until the consignee has had a reasonable time to remove the goods. See Price *v.* Powell, 3 Comst. 322; Mich. Central Railroad Co. *v.* Ward, 2 Mich. 538; Moses *v.* Boston & Maine Railroad, 32 N. H. R. 523; See Michigan Central Railroad Co. *v.* Hale, 6 Mich. 244.

[1] Forward *v.* Pittard, 1 Term R. 27; Post, § 536.

[2] Hyde *v.* Trent Navigation Co. 5 Term R. 389; 1 Bell, Comm. 464, 465; White *v.* Humphery, 11 Adolph. & Ellis, N. S. 45.

[3] Hyde *v.* Trent Navigation Co. 5 Term R. 389.

[4] *In re* Webb, 8 Taunt. R. 443; S. C. 2 J. B. Moore, R. 500; 2 Kent, Comm. 469; 1 Bell, Comm. p. 464, 465, 5th edit. See also, Thomas *v.* Boston and Provi-

takes to forward the goods beyond the line of his own carriage, and, on their arrival at the termination of his own route, he puts them into a proper vehicle for such further conveyance, having no interest therein, or hire therefor, his duty is completely discharged as carrier, and he is not responsible for any subsequent loss of the goods.[1]

§ 449. For the like reason, if a person is at the same time a wharfinger, a warehouseman, a forwarding merchant, and a carrier, and he receives goods into his warehouse, which is on his own wharf, to be forwarded to another place, and the goods are lost or destroyed, without any neglect or default on his part, before they are put upon their further transportation, he will not be liable for such loss; for his character and duty as a warehouse-man have not yet ceased, although, if his character as carrier had commenced, he might have been liable for the same loss; as, for example, if the goods had been stolen by thieves, who broke open the warehouse, or they had been destroyed by a fire wilfully kindled by them.[2]

§ 450. Warehouse-men are not only responsible for losses which arise by their negligence, but also for losses occasioned by the innocent mistake of themselves and of their servants, in making a delivery of the goods to a person not entitled to them.[3] For it is a part of their duty to retain the goods until they are demanded by the true owner; and if by mistake they deliver the goods to a wrong person, they will be responsible for the loss, as upon a wrongful conversion.[4] The Roman law inculcated a like duty and responsibility, and illustrated it by the case of a garment delivered to a fuller to dress, which he exchanged by mistake, or delivered to a wrong person, and

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dence Railroad Co. 10 Metcalf, R. 472; Smith *v.* Nashua and Lowell Railroad, 7 Foster, 91; Norway Plains Co. *v.* Boston and Maine Railroad, 1 Gray, 263.

[1] Ackley *v.* Kellogg, 8 Cowen, R. 223; Post, § 536 to 539.

[2] Platt *v.* Hibbard, 7 Cowen, R. 497; Roberts *v.* Turner, 12 Johns. R. 232; Roskell *v.* Waterhouse, 2 Stark. R. 461; 1 Bell, Comm. p. 454, 5th edit.; Goold *v.* Chapin, 10 Barbour, 616.

[3] Willard *v.* Bridge, 4 Barbour, Supreme Court (N. Y.), R. 361; Post, § 536, 537.

[4] Lubbock *v.* Inglis, 1 Stark. R. 104; Ante, § 414; Post, § 561, 570.

held him in such a case liable for the loss. *Et si pallium fullo permutaverit, et alii alterius dederit, ex locato actione tenebitur, etiamsi ignarus fecerit.*[1] It was formerly held, that a warehouse-man, who has received goods from a consignee to be kept for his use, is not bound, under all circumstances, to deliver them to the consignee, but may lawfully refuse to redeliver them, if they are the property of another person, and the latter prohibits the redelivery.[2] But this doctrine seems now to be treated as untenable; for it is said that in general an agent has no right to set up an adverse title against that of his principal, and the bailee is bound to deliver the goods back to the person by whom he has been intrusted with the custody of them.[3] [But this is probably to be limited to an action brought by the bailor himself, in which doubtless the bailee cannot dispute the bailor's title; but if the goods are taken out of the possession of the bailee by legal process against the bailor, this is a defence to the bailee in a suit for the goods by the bailor.[4]] And, indeed, it seems now established, that, whichever way he acts in such a case, either in making or refusing a delivery, after notice, it is at his own peril.[5]

§ 450 *a*. If by the negligence of a warehouse-man the goods are injured while in his possession, he will be responsible therefor, notwithstanding the goods are subsequently wholly lost or destroyed while in his possession, without his fault, as by a flood, or fire, or other inevitable accident.[6] [So, if by the negligence of the servant of the warehouse-man, the goods are not delivered when called for by the consignee, and the goods be destroyed by an accidental fire, the warehouse-man is responsible.[7]]

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[1] Dig. Lib. 19, tit. 2, l. 13, § 6; Pothier, Pand. Lib. 19, tit. 2, n. 29.

[2] Ogle *v.* Atkinson, 5 Taunt. R. 759. See also, Bates *v.* Stanton, 1 Duer, 79; Pitt *v.* Albritton, 12 Iredell, 77.

[3] Gosling *v.* Birnie, 7 Bing. R. 339; Kieran *v.* Sandars, 6 Adolph. & Ellis, 515; Holl *v.* Griffin, 10 Bing. R. 246; Story on Agency, § 217; 2 Story on Eq. Jurisp. § 814 to 816; Post, § 582.

[4] Burton *v.* Wilkinson, 18 Vermont, 186.

[5] Post, § 582.

[6] Powers *v.* Mitchell, 3 Hill (N. Y.), R. 545.

[7] Stevens *v.* Boston and Maine Railroad, 1 Gray, 277.

§ 451. (3) As to WHARFINGERS. Upon principle, their case is not distinguishable from that of other depositaries for hire; and therefore they are responsible only for ordinary diligence.[1] An attempt, however, has been made to extend their liability, and to make it coextensive with that of common carriers, founded upon some general expressions of Lord Mansfield and Lord Ellenborough, which, however, upon close examination, will be found not to justify the conclusion. Lord Mansfield, in one case, said: "It is impossible to make a distinction between a wharfinger and a common carrier. They both receive goods upon a contract. Every case against a carrier is like the same case against a wharfinger."[2] Now, it is most material to consider, that the sole point before the Court was, whether trover would lie against a carrier, when the goods had been lost or stolen by his negligence, and not converted by him; and at the argument a case was cited of a wharfinger, in which it was held, that an action on the case, and not trover, under such circumstances, was the proper action. In view of the argument, Lord Mansfield's language was most accurate and appropriate; for under such circumstances, there could be no difference between a wharfinger and a carrier, as to the form of the action.[3] In another case,[4] which was an action against the defendants, who were wharfingers and lightermen, for not safely keeping a quantity of goods intrusted to them in London, to be shipped to the vendees of the plaintiff at Newcastle, it appeared that the goods had been accidentally destroyed by fire while on the defendants' premises; and the question was, whether the defendants, whose duty it was to convey the goods from the wharf in their own lighter to the vessel in the river, were liable for the loss. Lord Ellen-

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[1] Jones on Bailm. 49, 96, 97. See Platt *v.* Hibbard, 7 Cowen, R. 497, 502, note (b); Foote *v.* Storrs, 2 Barbour, Supreme Court (N. Y.), R. 326; Story on Agency, § 217; 2 Story on Eq. Jurisp. § 814 to 816.

[2] Ross *v.* Johnson, 5 Burr. R. 2827.

[3] 1 Bell, Comm. p. 467, and note (6), 5th edit.; Packard *v.* Getman, 6 Cowen, R. 757.

[4] Maving *v.* Todd, 1 Stark. R. 72.

borough is reported to have said, that the liability of a wharfinger, while he has possession of the goods, was similar to that of a carrier. Now, it does not appear at what time the goods were destroyed by fire; whether when they were in the warehouse, or on the wharf of the defendants in their progress to be put on board of the lighter. If the goods were on the wharf in their transit to go on board of the lighter, the remark of Lord Ellenborough, though not quite accurate in expression, would, in substance, have been justifiable in the particular case; for the duty as lighter-man would then have commenced. But if his lordship meant to say (according to the *dictum* in Starkie's Reports), that the liability of a wharfinger and carrier was universally the same, he was certainly incorrect. The doctrine might perhaps be explicable upon another ground, that Lord Ellenborough treated the goods as being in the hands of the defendants, as lighter-men (who are deemed common carriers), *in transitu* for carriage, and not as mere wharfingers. The only point worthy of consideration in the case is, whether, as the defendants united both characters, they were, in point of fact, acting in the one character or the other at the time of the loss by the fire. In another report of the same case,[1] the action is said to have been brought against the defendants "as wharfingers;" and that the goods were burnt while on the wharf, before an opportunity of shipping them. But in this report no notice is taken of the above *dictum* of Lord Ellenborough: which may, therefore, justly raise some doubt as to the accuracy of the other report.

§ 452. The case of a wharfinger does not, indeed, seem in any respect distinguishable from that of a warehouse-man; and it has not, in fact, been distinguished from it in any solemn adjudication.[2] On the other hand, the case of a carrier has always been treated as an excepted case, turning upon peculiar principles of public policy. In fact, the case before Lord Ellenborough was decided in favor of the defendants on another point, that of a special contract, excluding losses by

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[1] 4 Camp. R. 225.

[2] Sidaways *v.* Todd, 2 Stark. R. 400; 1 Bell, Comm. p. 467, and note (6), 5th edit.

fire; and, therefore, it never called for any revision. If it is to be understood as containing any general proposition, not qualified by the particular circumstances of the case, it is opposed by other and better considered opinions.[1]

§ 453. At what time the responsibility of a wharfinger begins and ends, depends upon the question, when he acquires, and when he ceases to have, the custody of the goods in that capacity. This is generally governed by the usages of the particular trade or business. Where goods are in the wharfinger's possession to be sent on board of a vessel for a voyage, as soon as he delivers the possession and care of them to the proper officers of the vessel, although they are not actually removed, he is, by the usages of trade, deemed exonerated from any further responsibility; and the goods are deemed to be in the constructive possession of the officers of the ship.[2] On the other hand, a mere delivery of goods at a wharf is not necessarily a delivery of them to the wharfinger; but there must be some act or assent on his part, or on that of his servants or agents, to the custody thereof, before he will be deemed to have assumed the character of custodee.[3] A wharfinger, like other depositaries for hire, has a lien on the goods for his wharfage.[4] [And probably for his advances for freight on the goods.[5]] But in case of a sale of the thing by the owner, the lien attaches only to the amount of the debt existing at the time when he has notice of the sale, and not for any after-accruing debt.[6]

§ 453 *a*. Whether the class of persons which we are now

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[1] Garside *v.* Trent Nav. Co. 4 T. R. 581; Hyde *v.* The Same, 5 T. R. 389; *In re* Webb, 8 Taunt. R. 443; Platt *v.* Hibbard, 7 Cowen, R. 497, 502, the Reporter's note; Roberts *v.* Turner, 12 Johns. R. 232; Brown *v.* Denison, 2 Wend. R. 593; Coggs *v.* Bernard, 2 Ld. Raym. 909, 918; Sidaways *v.* Todd, 2 Stark. R. 400.

[2] Cobban *v.* Downe, 5 Esp. R. 41; Dig. Lib. 4, tit. 9, l. 3.

[3] Buckman *v.* Levi, 3 Camp. R. 414; Gibson *v.* Inglis, 4 Camp. R. 72; Packard *v.* Getman, 6 Cowen, R. 757.

[4] Johnston *v.* The Schooner Macdonough, Gilpin's R. 101; *Ex parte* Lewis, 2 Gall. 483.

[5] Sage *v.* Gittner, 11 Barbour, 120.

[6] Barry *v.* Longmore, 4 Perr. & Dav. 344.

considering, that is, hirers of custody, have a lien on the thing for their hire, labor, and services, is a matter upon which the authorities do not seem agreed, or at least do not present rules to guide us. Upon general principles, it would seem that they ought to have a specific lien on the thing for such hire, labor, and services, like artisans. The question, whether they have a general lien for a balance of account, is quite a different question, and depends upon different principles. In respect to a specific lien, it has been laid down as a general rule, that, where a bailee spends labor and skill in the improvement of the chattel bailed, he has a lien on it.[1] But it has been added, that his lien is confined to cases where additional value has been conferred by him on the chattel, either directly, by the exercise of personal labor and skill, or indirectly, by the intervention of any instrument over which he has a control.[2] Upon this latter ground, it has been held in England, that an agistor of cattle has no lien on the cattle for the pasturage consumed. This doctrine has not as yet been recognized in America;[3] and certainly it is not without its difficulties. It may be admitted to be regularly correct in its application to livery-stable keepers, because there would seem to be an implied contract to deliver the animal at the mere pleasure of the owner. [And such is the established rule in America.[4]] But the case is not so clear as to an agistor of cattle, whose principal remedy would seem to be, in relation to mere strangers, such as drovers, like that of an innkeeper. Be this as it may, it has been recently held in America, that warehouse-men have a specific lien, although they certainly cannot be said by their *care* and skill to have improved the thing bailed.[5] The same would seem to belong to a wharfinger.[6]

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[1] Bevan *v.* Waters, 1 Mood. & Malk. 235; s. c. 3 C. & P. 520; Forth *v.* Simpson, 13 Ad. & Ell. N. S. 680.

[2] Scarfe *v.* Morgan, 4 Mees. & Welsb. 270; Jackson *v.* Cummins, 5 Mees. & Welsb. 342.

[3] But see Grinnell *v.* Cook, 3 Hill (N. Y.), R. 485.

[4] Miller *v.* Marston, 35 Maine, 154.

[5] Steinman *v.* Wilkins, 7 Watts & Serg. R. 466.

[6] Ibid.; Rex *v.* Humphery, 1 McLel. & Younge, 194, 195.

§ 454. In respect to depositaries for hire, there seem to be some discrepancies in the authorities, whether the *onus probandi* of negligence lies on the plaintiff, or of exculpation on the defendant, in a suit brought for the loss. In England the former rule is maintained.[1] In America, an inclination of opinion has sometimes been expressed the other way; yet perhaps the weight of authority coincides with the English rule.[2] In case of the loss of goods by the theft or embezzlement of the storekeeper or servants of a warehouse-man, it has been expressly decided, that the burden of proof to establish negli-

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[1] Finucane *v.* Small, 1 Esp. R. 316; Harris *v.* Packwood, 3 Taunt. R. 267; Marsh *v.* Horne, 5 Barn. & Cress. 322, 327; Ante, § 278, 339, 410, 454, 529. But see Mackenzie *v.* Cox, 9 Car. & P. 632, *contrà*.

[2] Platt *v.* Hibbard, 7 Cowen, R. 497, 500. See also, Beardslee *v.* Richardson, 11 Wend. R. 25; Schmidt *v.* Blood, 9 Wend. R. 268; Ante, § 410; Tompkins *v.* Saltmarsh, 14 Serg. & Rawle, 275; Ante, § 213, 278, 339; Post, § 529; Beckman *v.* Shouse, 5 Rawle, 179; Clark *v.* Spence, 10 Watts, R. 335. In this last case, Rogers, J., in delivering the opinion of the Court, said: "In Platt *v.* Hibbard, 7 Cowen, R. 501, it is ruled, that where property intrusted to a warehouse-man, wharfinger, or storing or forwarding merchant, in the ordinary course of business, is lost, injured, or destroyed, the weight of proof is with the bailee, to show a want of fault or negligence on his part, or in other words, to show the injury did not happen in consequence of his neglect to use all that care and diligence, on his part, that a prudent and careful man would exercise in relation to his own property. It is to be regretted, that this is not the rule, but it seems to be contrary to the current of authority, as has been clearly shown by the cases cited at the bar. The rule is, that, when a loss has been proved, or when goods are injured, the law will not intend negligence. The bailee is presumed to have acted according to his trust, until the contrary is shown. But to throw the proofs of negligence on the bailors, it is necessary to show, by clear and sstisfactory proof, that the goods were lost, and the manner they were lost. All the bailor has to do, in the first instance, is to prove the contract and the delivery of the goods, and this throws the burden of proof that they were lost, and the manner they were lost, on the bailee, of which we have a right to require very plain proofs." It seems, that in cases of this sort the bailor, although the plaintiff, is a competent witness to prove the contents of the package lost. Ibid. See also, Oppenheimer *v.* Edney, 9 Humphreys, R. 385. [But the case of Platt *v.* Hilliard, referred to above, has been overruled in New York. Foote *v.* Storrs, 2 Barbour, Supreme Ct. R. 326. In a later case it was said that the bailee must give some account of the property, before he could call upon the plaintiff to prove negligence. Bush *v.* Miller, 13 Barbour, 482. See 11 Cush. 70.]

gence lies upon the owner of goods.[1] We have already seen, that the Roman law is supposed in all cases of theft to throw the burden of proof on the bailee to repel the presumption of negligence.[2] By the French law, where a loss or injury happens to the thing deposited for hire, the burden of proof is in like manner thrown on the hirer to repel the presumption.[3]

§ 455. (4) FACTORS AND OTHER BAILIFFS to manage for hire. These agents are generally held liable only for a reasonable exercise of skill, and for ordinary care and diligence in their vocation.[4] They are, consequently, not liable for any loss by theft, robbery, fire, or other accident, unless it is connected with their own negligence.[5] Factors have, generally, a right to sell goods; but they have no right to pawn them.[6] They are at liberty to act according to the general usages of trade, and to give credit on sales, wherever that is customary.[7] They are bound, however, in all cases, to follow the lawful instructions of their principals.[8] If they act with reasonable diligence and good faith, they are protected. In cases of unforeseen emergency and necessity, they may even act contrary to the general tenor of the instructions of their principal, if those instructions are manifestly applicable to ordinary circumstances only.[9] But good faith alone is not sufficient. There must be reasonable skill, and a careful obedience to orders on their part. If there is any loss occasioned by their negligence, or mistake, or inadvertence, which might fairly have been guarded against by ordinary diligence, they will be held responsible therefor; and *a fortiori* they will be held responsible where they are

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[1] Schmidt *v.* Blood, 9 Wend. R. 268.

[2] Ante, § 38, 39, 334, note (2), § 410, note, § 444; Jones on Bailm. 15, 16. See Dig. Lib. 19, tit. 2, l. 9, § 4; Pothier, Pand. Lib. 19, tit. 2, n. 28.

[3] Pothier, Contrat de Louage, n. 194, 199, 200; Ante, § 334, note (2), § 411.

[4] Jones on Bailm. 98; Story on Agency, § 182 to 186.

[5] Jones on Bailm. 98; Vere *v.* Smith, 1 Vent. 121; Coggs *v.* Bernard, 2 Ld. Raym. 909, 918.

[6] Ante, § 305, 306; Story on Agency, § 78, 113, 225.

[7] Story on Agency, § 60, 110, 209; Id. 199.

[8] Streeter *v.* Horlock, 1 Bing. R. 34; Story on Agency, § 192, 193, 198.

[9] Story on Agency, § 85, 118, 141, 193.

guilty of any misfeasance.[1] The rights, duties, and responsibilities of factors, however, more properly belong to a Treatise on Agency; and therefore it is sufficient to make these brief remarks in this place.[2]

§ 456. Although factors and other depositaries for hire are thus bound to ordinary diligence, they are not under any obligation to suggest to their principals wise precautions against inevitable accident.[3] They are, therefore, not bound to advise insurance against fire; much less are they bound to procure insurance upon the thing bailed, without some authority, express or implied, from their employer.[4] It is quite a different question, whether they may not insure the thing bailed, not only on their own account, but also for the benefit of their bailors. It has been held, that factors may procure insurance, not only for the benefit of themselves, but also of their principals, even when they are not obliged to do so.[5] But whether naked consignees of goods, or mere depositaries for hire, may so do, is a question which seems not as yet to have been directly adjudicated.[6]

ART. IV. HIRE OF CARRIAGE OF GOODS.

§ 457. The next class of bailments for hire, which is entitled to attention, is that of the *Locatio mercium vehendarum*, or the carriage of goods for hire. In respect to contracts of this sort entered into by private persons, who do not exercise the business of common carriers, there does not seem to be any material distinction, varying the rights, obligations, and duties

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[1] Ulmer *v.* Ulmer, 2 Nott & McCord, 489; Story on Agency, § 182, 183, 184, 185, 188.

[2] See Livermore on Agency, and Paley on Agency; Com. Dig. *Merchant*, B.; Bac. Abr. *Merchant and Merchandise;* Story on Agency, passim, and especially § 33, 110 to 113.

[3] Ante, § 188; Jones on Bailm. 101, 102.

[4] Jones on Bailm. 102.

[5] Story on Agency, § 111; Deforest *v.* Fulton Insurance Company, 1 Hall, R. 84, 106, 107, 134, 135; Lucena *v.* Craufurd, 1 Taunt. 325.

[6] Ibid.

of the parties from those of other bailees for hire.[1] Every such private person is bound to ordinary diligence, and to a reasonable exercise of skill; and of course he is not responsible for any losses, not occasioned by the ordinary negligence of himself or of his servants.[2] He will not, therefore, be liable for any loss by thieves,[3] or for any taking from him or them by force, or where the owner accompanies the goods to take care of them, and is himself guilty of negligence.[4] This is the general rule; and it of course applies to all cases where he has not assumed the character of a common carrier, unless, indeed, he has expressly, by the terms of his contract, taken upon himself any such risk.[5] Thus, a private person, who has undertaken the carriage of goods for hire, and warranted that they shall go safe, will be held liable upon his undertaking for any loss within the scope of his contract, although not as a common carrier.[6] But even an express undertaking by a private person to carry goods safely and securely, is but an undertaking to carry them safely and securely, free from any negligence of himself or his servants; and it does not insure the safety of the goods against losses by thieves, or any taking by force.[7]

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[1] Post, § 495, 496. See Gordon *v.* Hutchinson, 1 Watts & Serg. 285.

[2] Coggs *v.* Bernard, 2 Ld. Raym. 909, 917, 918; Hodgson *v.* Fullarton, 4 Taunt. R. 787; Hatchwell *v.* Cooke, 6 Taunt. R. 577; 2 Marsh. R. 293; Jones on Bailm. 103, 106, 121; 1 Bell, Comm. p. 461, 463, 467, 5th edit.; 1 Bell, Comm. § 396 to 404, 4th edit.; 2 Kent, Comm. Lect. 40, p. 597, 598, 4th edit.; Satterlee *v.* Groat, 1 Wend. R. 272; Beckman *v.* Shouse, 5 Rawle, R. 179; Hollister *v.* Nowlen, 19 Wend. R. 234, 239.

[3] Fay *v.* Steamer New World, 1 Califor. 348.

[4] Brind *v.* Dale, 8 Carr. & Payne, 207, 209, 211; s. c. 2 Mood. & Rob. R. 80; Post, § 533; White *v.* Winnisimmet Co. 7 Cush. 159.

[5] Ibid.

[6] Fish *v.* Chapman, 2 Kelly, 349; Robinson *v.* Dunmore, 2 Bos. & Pull. 417; Brind *v.* Dale, 8 Carr. & Payne, 207, 209, 211; s. c. 2 Mood. & Rob. 80; Jones on Bailm. 98; Ante, § 33, 34, 35, 68 to 72, 444 to 450; Post, § 495, 496.

[7] Brind *v.* Dale, 8 Carr. & Payne, 207, 209, 211; s. c. 2 Mood. & Rob. 80; Robinson *v.* Dunmore, 2 Bos. & Pull. 417; Jones on Bailm. 97, 98. But see 1 Bell, Comm. p. 463, 464, 5th edit.; 1 Bell, Comm. § 387, 4th edit. In cases of the carriage of goods for hire, by persons who are not common carriers, the *onus probandi* is on the plaintiff to show that the loss has been by the negligence of the carrier or his servants, as it is in other cases of ordinary hire. Id. Brind *v.*

§ 458. In respect to carriers for hire generally, it would not seem that they were originally by the Roman law put under any peculiar obligations, which did not belong to other bailees for hire.[1] A special Edict, however, was passed by the Prætor, by which shipmasters, innkeepers, and stable-keepers were put under a peculiar responsibility, and made liable for all losses not arising from inevitable casualty, or overwhelming force.[2] *Ait Prætor; Nautæ, caupones, stabularii, quod cujusque salvum fore receperint, nisi restituent, in eos judicium dabo.*[3] Upon which Ulpian remarks: *Maxima utilitas est hujus Edicti; quia necesse est plerumque eorum fidem sequi, et res custodiæ eorum committere.*[4] *At hoc edicto omni modo, qui recepit tenetur, etiamsi sine culpâ ejus res periit, vel damnum datum est, nisi si quid damno fatali contingit. Inde Labeo scribit; Si quid naufragio, aut per vim piratarum perierit, non esse iniquum, exceptionem ei dari.*[5] The modern nations of Continental Europe seem to have incorporated the same general obligations into their jurisprudence, with exceptions of a like nature.[6] The Roman Edict, it will be at once perceived, did not extend in terms to carriers on land. But in most, if not in

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Dale, 8 Carr. & Payne, 212; Ante, § 410, 454. The doctrine in the text applies solely to persons who are private carriers (not being common carriers), for hire. If they are gratuitous carriers, they are not liable, except for their own fraud or gross negligence, like all other gratuitous mandataries. Jones on Bailm. 62, 63; Beauchamp *v.* Powley, 1 Mood. & Rob. 38.

[1] 1 Domat, B. 1, tit. 4, § 8, art. 5; 1 Bell, Comm. p. 463, 464, 465, 5th edit.; 1 Bell, Comm. § 396 to 403, 4th edit.

[2] 1 Bell, Comm. p. 465, 466, 5th edit.; 1 Bell, Comm. § 398, 402, 403, 4th edit.; Pothier, Pand. Lib. 4, tit. 9, n. 1, 7; Ersk. Inst. B. 3, tit. 1, § 28; Dig. Lib. 4, tit. 9, l. 1, 5; 1 Domat, B. 1, tit. 16, § 1, art. 4; Id. § 2, art. 1 to 4.

[3] Dig. Lib. 4, tit. 9, l. 1; Pothier, Pand. Lib. 4, tit. 9, n. 1.

[4] Dig. Lib. 4, tit. 9, l. 1, § 1; Pothier, Pand. Lib. 4, tit. 9, n. 1.

[5] Dig. Lib. 4, tit. 9, l. 3, § 1; Pothier, Pand. Lib. 4, tit. 9, n. 7, 8; Jones on Bailm. 96.

[6] Pardessus, Droit Comm. Part 2, art. 516, 542, 545, 553; Code Civil of France, art. 1732 to 1736; 1 Domat, B. 1, tit. 16, § 1, 2; Merlin, Repert. art. *Voiturier;* Ersk. Inst. B. 3, tit. 1, § 28, tit. 3, § 15, 16; Moreau & Carlton's Partidas, Part 5, tit. 8, l. 26; Code of Louisiana of 1825, art. 2938, 2939; Id. 2722, 2725.

all, modern countries, the rule which it prescribes has been practically expounded so as to include them.[1]

§ 459. The common law, however, has extended the liability of all carriers, who are common carriers for hire, beyond that which is supposed to exist in the Roman law. The Roman law, as has been already suggested (and as we shall hereafter more fully see), did not make the carrier liable for losses occasioned by irresistible force, *vis major*, or by inevitable accident. And it accounted robbery among the cases of irresistible force, or fatal damage. But the common law allows no excuse in cases of robbery, unless the robbery be by public enemies.[2] As this subject is of great importance and interest, it will be extensively examined under the succeeding heads of inquiry.

ART. V. EXCEPTED CASES.

§ 460. We come, then, in the next place, to the consideration of those cases of hire which constitute EXCEPTIONS from the general rule, as to the rights, the duties, and the responsibilities of the parties, in bailments of this nature. These are the cases of POSTMASTERS, INNKEEPERS, and COMMON CARRIERS. Each of these exceptions stands upon the ground of some peculiar public policy, and therefore requires a separate examination.

ART. VI. POSTMASTERS.

§ 461. And first as to POSTMASTERS. When the mail was carried for hire by private persons, from town to town, on their own account, their case was not, at the common law, different, in point of right and responsibility, from that of other common carriers; for there does not seem any sound distinction between the carriage of letters and the carriage of

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[1] Ersk. Inst. B. 3, tit. 1, § 28, and note; 1 Domat, B. 1, tit. 16, § 1; Id. § 2, per totum; 1 Bell, Comm. p. 467, 5th edit.; 1 Bell, Comm. § 398, 399, 402, 403, 4th edit.; Post, § 488.

[2] Post, § 464, 465, 489; Jones on Bailm. 96.

other goods or packages.[1] In the reign of Charles the Second,[2] in pursuance of the policy of the government during the time of the Commonwealth, a general post-office was established under the authority of Parliament, and a postmaster-general and subordinate post-officers and postmasters were created, with appropriate salaries and compensation; and by these and by later acts, the carrying of letters by private persons has been prohibited.[3]

§ 462. In the year 1699, an action was brought against the postmaster-general for the loss of a letter, containing exchequer bills, by the negligence of his servants and deputies; and three Judges, against the opinion of Lord Holt, then held, that the plaintiff was not entitled to recover.[4] The ground of the opinion of the three Judges, appears to have been, that the post-office establishment is a branch of the public police, created by statute for purposes of revenue, as well as for public convenience; and that the government have the management and control of the whole concern. It is, in short, a government instrument, established for its own great purposes. The postmasters enter into no contract with individuals, and receive no hire, like common carriers, in proportion to the risk and value of the letters under their charge, but only a general compensation from the government itself.[5] The same question was again still more elaborately discussed in another case in the time of Lord Mansfield, brought against the postmaster-general, to recover the amount of a bank-note, stolen out of a letter by one of the sorters of letters, when the Court adhered to the doctrine of the three Judges against the opinion of Lord Holt.[6] Upon that occasion, Lord Mansfield said: "The ground of Lord Holt's opinion in that case is founded upon

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[1] Jones on Bailm. 109, 110; Whitfield *v.* Despencer, Cowp. R. 754, 765; Lane *v.* Cotton, 1 Ld. Raym. 646.

[2] Stat. 12 Charles 2, ch. 35.

[3] Jones on Bailm. 109; 1 Bell, Comm. p. 468, 5th edit.; 1 Bell, Comm. § 400, 401, 4th edit.

[4] Lane *v.* Cotton, 1 Ld. Raym. 646; s. c. 12 Mod. R. 482.

[5] 2 Kent, Comm. Lect. 40, p. 610, 611, 4th edit.; 1 Black. Comm. 323.

[6] Whitfield *v.* Despencer, Cowp. R. 754.

comparing the situation of the postmaster to that of a common carrier, or the master of a ship taking goods on board for freight. Now, with all deference to so great an opinion, the comparison between a postmaster and a carrier, or the master of a ship, seems to me to hold in no particular whatever. The postmaster has no hire, enters into no contract, carries on no merchandise or commerce. But the post-office is a branch of revenue and a branch of police, created by act of Parliament. As a branch of revenue, there are great receipts; but there is likewise a great surplus of benefit and advantage to the public arising from the fund. As a branch of police, it puts the whole correspondence of the country (for the exceptions are very trifling), under government, and intrusts the management and direction of it to the crown, and the officers appointed by the crown. There is no analogy, therefore, between the case of the postmaster and a common carrier."[1] In truth, in England and in America the postmasters are mere public officers, appointed by, and responsible to, the government; and the contracts made by them officially are public contracts, and not private contracts, and are binding on the government, and not on themselves personally.[2]

[§ 462 *a*. The same rule applies to mail contractors; they are not liable for money lost through the carelessness of their agents who carry the mail.[3]]

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[1] Ibid.

[2] Dunlap *v.* Munroe, 7 Cranch, R. 242; 2 Kent, Comm. Lect. 40, p. 610, 4th edit.; Story on Agency, § 302 to 307.

[3] [Conwell *v.* Voorhees, 13 Ohio, 523; Hutchins *v.* Brackett, 2 Foster, 252. In this case Perley, J., said: — "The general question then arises, whether contractors for the transportation of the public mails are liable in assumpsit for the neglect of mail carriers, employed by them on their routes, to carry and deliver way-letters, according to their duty and the regulations of the post-office.

"The leading case on this subject is Lane *v.* Cotton *et al.* decided in 1701, and reported 1 Ld. Raymond, 646; 12 Modern, 472, and 1 Salkeld, 17. That action was case against the defendants as postmaster-general of England, for negligence in the execution of their office, by which a letter containing divers exchequer bills of the plaintiff, being delivered into the office at London, to be

§ 463. But although the postmaster-general is not liable as a common carrier, or for any negligence or delinquency of

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sent by post to Worcester, was opened in the office, and the exchequer bills inclosed taken away.

"It appeared, in a special verdict, that a letter of the plaintiff's containing eight exchequer bills, was deposited in the post-office in London, which was in charge of the defendants' deputy, and the letter opened in the office, by some person unknown, and the bills taken away.

"It was held by three Judges, against an elaborate dissenting opinion of Lord Holt, that the defendants were not liable for the defaults of the other officers and agents of the post-office, on the ground that the post-office was an institution of the Government, established and regulated by law; that all the officers and agents of the post-office, were officers and agents of the Government, and not the agents and servants of the postmaster; that no contract was made by the postmaster, or any officer or agent of the post-office, with those who use the public accommodation of the office; that each officer and agent was liable in a proper form of action to any individual who had suffered by his neglect of duty; but that no officer or agent was liable for the default of another. It is related by Lord Campbell, in his Lives of the Chief Justices, Vol. 2, page 141, as a remarkable instance of the overwhelming weight of Lord Holt's opinion, even when in the wrong, that in this case of Lane *v.* Cotton *et al.* the defendants, notwithstanding the judgment of the Court in their favor, were so alarmed by the threat of a writ of error that they paid the whole demand.

"The same point was incidentally discussed in Rowning *v.* Goodchild, 2 W. Blackstone, 906, but does not appear to have been drawn directly in question again, until the case of Whitfield *v.* Lord LeDespencer, Cowper, 754, decided in 1778, in which the doctrine of Lane *v.* Cotton *et al.* was confirmed, and the point appears never to have been questioned since in England.

"The doctrine of these English cases has been recognized in this country, and applied to the post-office establishment of the United States. Dunlap *v.* Munroe, 7 Cranch, 242; Schroyer *v.* Lynch, 8 Watts, 453; Conwell *v.* Voorhees, 13 Ohio Rep. 523.

"In Conwell *v.* Voorhees, it was decided that a mail contractor is not liable to the owner of a letter containing money, transmitted by mail, and lost by the carelessness of the contractor's agent in carrying the mail.

"That action was case, and the declaration alleged that the plaintiff put in the post-office, at Liberty, a letter containing four hundred dollars, directed to Cincinnati; that the letter came to the possession of the defendants as mail carriers, and was lost by their negligence.

"The letter was lost from the mail carried by a coachman employed by the defendants. The Court say, 'A mail carrier has no contract with those who transmit articles by the public mail; he receives no fee or reward from them. His contract is with the government of the United States, for the performance

the deputy postmasters, or clerks, or other servants in office under him, it does not follow, that these deputies and servants are not liable for losses occasioned by their own negligence and delinquency. On the contrary, it is clear, that they are personally liable for all losses and injuries occasioned by their own respective defaults in office.[1] Whether a deputy postmaster is liable for the neglect of the clerks and servants in office under him, has been several times mooted in the American courts.[2] [In one case a deputy postmaster who employed an assistant without having him sworn to the faithful discharge of his duties, as required by law, was held liable for such assistant's negligence in refusing to deliver a letter.[3]] In one

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of acts in the execution of a public function; he is remunerated by the government. So far then as the transmission of the mail is concerned, a mail carrier is a public agent, and as such only responsible. Hence, the defendants, being public agents, are not responsible for the negligence or misfeasance of the drivers.'

"We are not able to distinguish Conwell *v.* Voorhees from this case. Smith could not lawfully carry the letter, except as a way-letter in the mail, and as the agent of the post-office. It can make no difference whether he carried the letter in the mail-bag, or, as a way-letter, in his pocket. In both cases the mail carrier acts as a public agent, in the discharge of a public duty, and not as the mere servant of the contractor, who employs him. He takes an oath for the faithful discharge of his duty, and is subject by law, to various penalties for violation of it. Act of Congress, March 3, 1825; United States Statutes, 103, 104, 106, and 107.

"We are therefore of opinion, that the defendants cannot be charged in this action, because they are not liable for the defaults of Smith, their subordinate public agent in the post-office. Smith would himself be liable, if the plaintiff had suffered from his negligence in the discharge of his duty, as carrier of the mail; but not in this form of action, as no contract is implied on the part of the post-office department, or any of its officers or agents, with individuals who send letters or money through the office. There must be judgment for the defendants."]

[1] Rowning *v.* Goodchild, 3 Wilson, R. 443; Whitfield *v.* Despencer, Cowp. R. 754; 2 Kent, Comm. Lect. 40, p. 610, 611, 4th edit.; Stock *v.* Harris, 5 Burr. R. 2709; 1 Bell, Comm. p. 468, 5th edit.; Christy *v.* Smith, 23 Verm. 663; Maxwell *v.* M'Ilvoy, 2 Bibb, 211; Bolan *v.* Williamson, 2 Bay, 551.

[2] 1 Bell, Comm. p. 468, 469, 5th edit.; 1 Bell, Comm. § 400, 401, 4th edit.; Dunlap *v.* Munroe, 7 Cranch, R. 242, 269; 2 Kent, Comm. Lect. 40, p. 610, 611, 4th edit.

[3] Bishop *v.* Williamson, 2 Fairf. 495.

case it was held, that, if it is intended in any action to charge any postmaster for the default of his clerk or servant, the declaration should state the case according to the fact; and that, upon a general charge of negligence of the postmaster himself, it is not competent to give evidence of the negligence of his clerk or servant.[1] If an action should be properly framed for the purpose of charging the deputy postmaster with the default of the clerks or servants in office under him, it seems that his liability in such an action will depend upon the question, whether he has in fact been guilty of any negligence, in not properly superintending them in the discharge of their duties in his office.[2] For it has been held, that a deputy postmaster is responsible only for the neglect of ordinary diligence in the duties of his office, which consists in the want of proper attention to his duties in person, or by his assistants, if he has any, or in the want of that care which a man of common prudence would take of his own affairs.[3] He is not, therefore, responsible for any losses occasioned by the negligence, or delinquencies, or embezzlements of his official assistants, if he exercises a due and reasonable superintendence over their official conduct, and he has no reason to suspect them guilty of any negligence or malconduct.[4] In short, such assistants are not treated as strictly his private servants; but, in some sort, as public officers, although appointed by him.[5]

ART. VII. INNKEEPERS.

§ 464. (2) As to INNKEEPERS; that is to say, the keepers of common inns for the accommodation of travellers in general.[6]

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[1] Dunlap *v.* Munroe, 7 Cranch, R. 242, 269; s. c. 2 Peters, Cond. R. 484. This position seems irreconcilable with the general doctrine in Brucker *v.* Fromont, 6 Term R. 659. See Campbell *v.* Phelps, 17 Mass. R. 244.

[2] Dunlap *v.* Munroe, 7 Cranch, R. 242, 269; 2 Kent, Comm. Lect. 40, p. 610, 611, 4th edit.

[3] Schroyer *v.* Lynch, 8 Watts, 453; Wiggins *v.* Hathaway, 6 Barbour, 632.

[4] Ibid.

[5] Ibid.

[6] Post, § 475.

The soundness of the public policy of subjecting particular classes of persons to extraordinary responsibility, in cases where an extraordinary confidence is necessarily reposed in them, and there is an extraordinary temptation to fraud, or danger of plunder, can hardly admit of question; and a rule to this effect has accordingly been recognized in the jurisprudence of many countries.[1] Hence arose the Prætor's Edict in the Roman law, already alluded to, which declared that, if shipmasters, innkeepers, and stable-keepers did not restore what they had received to keep safe, he would give judgment against them. *Nautæ, caupones, stabularii, quod cujusque salvum fore receperint, nisi restituent, in eos judicium dabo.*[2] The reason assigned by Ulpian for this Edict is, that it is necessary to place confidence in such persons, and to commit the custody of things to them; that no person ought to complain of the severity of the rule; for it is in his own choice to receive the goods of other persons or not; and unless the rule was thus established, an opportunity would be afforded to them to combine with thieves against those who trusted them; whereas they now have an inducement to abstain from such combinations.[3] *Ne quisquam putet, graviter hoc adversus eos constitutum; nam est in ipsorum arbitrio, ne quem recipiant; et nisi hoc esset statutum, materia daretur cum furibus adversus eos, quos recipiunt, coeundi; cum ne nunc quidem abstineant hujusmodi fraudibus.*[4] Gaius has observed, that, although neither shipmasters, nor innkeepers, nor stable-keepers receive a compensation for mere custody; but shipmasters for the carriage of goods, and innkeepers for the accommodation and entertainment of their guests, and stable-keepers for the stable room and keeping of cattle; yet they are bound for custody of the thing, in like manner as a fuller and a mender of clothes are bound for custody of the

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[1] 1 Bell, Comm. p. 465 to 476, 5th edit.; 1 Bell, Comm. § 395 to 406, 4th edit.; 2 Kent, Comm. Lect. 40, p. 597 to 611, 4th edit.

[2] Ante, § 457; Dig. Lib. 5, tit. 9, l. 1; Pothier, Pand. Lib. 4, tit. 9, n. 1; 1 Domat, B. 1, tit. 16, § 1, 2; Heinecc. Pand. Lib. 4, tit. 8, § 544, 545, 547.

[3] Dig. Lib. 4, tit. 9, l. 1, § 1; Pothier, Pand. Lib. 4, tit. 9, n. 1; Heinecc. Pand. Lib. 4, tit. 8, § 545.

[4] Dig. Lib. 4, tit. 9, l. 1, § 1; Pothier, Pand. Lib. 4, tit. 9, n. 1.

thing; and they are answerable *ex locato* for ordinary negligence, although they receive their compensation not strictly for custody, but for the exercise of their art. *Nam et fullo, et sarcinator, non pro custodiâ, sed pro arte, mercedem accipiunt; et tamen custodiæ, nomine ex locato tenetur.*[1]

§ 465. The construction put upon this Edict was, that the bailees were liable in every case of loss or damage, although happening without any default on their part, unless it happened by what was called a fatal damage. *At hoc Edicto omnimodo, qui recepit, tenetur, etiamsi sine culpâ ejus res periit, vel damnum datum est; nisi si quid damno fatali contingit;*[2] and among fatal damages were included losses by shipwreck, by lightning, or other casualty, by pirates, and by superior force. *Inde Labeo scribit; si quid naufragio, aut per vim piratarum perierit, non esse iniquum, exceptionem ei dari. Idem erit dicendum, et si in stabulo, aut in cauponâ vis major contigerit.*[3] Losses by fire, burglary, and robbery seem also to have been deemed losses by fatal damage.[4] Mr. Bell, indeed, seems to think that the latter ought to be so deemed; but he admits that the opinion of many jurists is against him.[5] But theft was not numbered among such casualties.[6] And the bailees were liable, not only for themselves, but for their servants and other persons employed in their service and under their protection and authority. Thus, shipmasters were liable for the acts of their under-officers, and other persons employed in their service; innkeepers for the acts of their servants and boarders; and stable-keepers for the acts of servants and other persons in their service.[7]

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[1] Dig. Lib. 4, tit. 9, l. 5; Pothier, Pand. Lib. 4, tit. 9, n. 4; Jones on Bailm. 94; Pothier, Traité de Dépôt, n. 79; 2 Kent, Comm. Lect. 40, p. 592, 4th edit.

[2] Dig. Lib. 4, tit. 9, l. 3, § 1; 1 Domat, B. 1, tit. 16, § 1, art. 4, 5; Heinecc. Pand. Lib. 4, tit. 8, § 551; Pothier, Pand. Lib. 4, tit. 9, n. 7.

[3] Ibid.

[4] Ersk. Inst. B. 3, tit, § 28; 1 Voet ad Pand. 301.

[5] 1 Bell, Comm. p. 469, 470, and note, ibid. 5th edit.; 1 Bell, Comm. § 398, 399, 403, 4th edit.

[6] Dig. Lib. 4, tit. 9, l. 5, § 1; Pothier, Pand. Lib. 4, tit. 9, § 8.

[7] Dig. Lib. 4, tit. 9, l. 1, § 8, l. 2, 3; 1 Domat, B. 1, tit. 16, § 1, art. 3; Id.

§ 466. But the responsibility of innkeepers, for the acts and misdeeds of persons in their service, was not an unlimited responsibility. It was not sufficient to create the responsibility that the guest had brought his goods or baggage to the view or the knowledge of the innkeeper; but they must have been delivered into his charge.[1] The guest or traveller was bound to deliver his baggage into the custody of the proper persons; and if he chose to trust his goods or baggage to one not employed in such a service, as if he gave a bag of money to a child or to a scullion, the innkeeper was not responsible for the loss thereof.[2] So, the innkeeper was responsible only for the acts of his servants done in his own house; and not for their acts done elsewhere; such as for a theft in another place.[3]

§ 466 *a*. The responsibility of innkeepers, although it thus extended to the acts and misconduct of their servants and boarders, did not, by the Roman law as it should seem, ordinarily extend to the acts or misconduct of other travellers, or guests, or persons coming or going to the inn. Hence, if a theft was committed or a damage done by such travellers, guests, or other transient persons, without the connivance of the innkeeper, he was not, unless under special circumstances, held responsible therefor.[4] The reason assigned for the distinction is, that the innkeeper has no right of choice as to the persons who may come to his inn as travellers, but he is bound to receive them; whereas his servants and his boarders are admitted and selected by his own choice. *Caupo præstat factum eorum, quia in eâ cauponâ ejus cauponæ exercendæ causâ ibi sunt; item eorum, qui habitandi causâ ibi sunt. Viatorum autem factum non præstat; namque viatorem sibi eligere caupo vel stabularius non videtur, nec repellere potest iter agentes. Inhabitatores*

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§ 2, art. 2; Heinecc. Pand. Lib. 4, tit. 8, § 446, 551, 552; 1 Bell, Comm. p. 469, 471, 5th edit.; 1 Bell, Comm. § 398, 399, 403, 4th edit.

[1] Pothier, Traité de Dépôt, n. 79, 80.

[2] 1 Domat, B. 1, tit. 16, § 1, art. 3, 4; Sneider *v.* Geiss, 1 Yeates, R. 34. See Dig. Lib. 47, tit. 5, l. 1, § 2, 4, 6; Pothier, Traité de Dépôt, n. 80.

[3] 1 Domat, ibid. n. 7.

[4] Post, § 468.

vero perpetuos ipse quodammodo elegit, qui non rejecit, quorum factum oportet eum præstare. In navi quoque vectorum factum non præstatur.[1] It is not, perhaps, very easy to reconcile this language with that used in another title of the Digest. (*Nauta*) *factum non solum nautarum præstare debere, sed et vectorum. Sicut et caupo viatorum.*[2] Pothier reconciles the passages, however, by supposing that in the latter case there is an express deposit of the goods with the innkeeper, and in the former not.[3]

§ 467. The doctrines thus asserted in the Roman law, in respect to innkeepers, seem to have been generally incorporated into the jurisprudence of Continental Europe.[4] They will be found in the law of Spain,[5] of France,[6] of Scotland,[7] and Louisiana,[8] and probably in that of every other nation, whose jurisprudence had its origin in the Roman law.

§ 468. Pothier[9] has deduced from the text of the Roman law the doctrine, that the innkeeper is not only bound for good faith, as in the case of ordinary deposits, but also for exact care (*un soin exact*) and that, consequently, he is responsible for slight neglect, or, at least, for ordinary neglect (*de la faute légère*).[10] He therefore holds him liable for losses by the theft of his domestics and boarders, and of his other guests, and of persons coming and going to and from the inn, when the goods are expressly delivered into the custody and charge of the inn-

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[1] Dig. Lib. 47, tit. 5, l. 1, § 6; Pothier, Traité de Dépôt, n. 79.

[2] Dig. Lib. 4, tit. 9, l. 1, § 8; Id. l. 2; Pothier, Pand. Lib. 4, tit. 9, n. 8.

[3] Pothier, Traité de Dépôt, n. 78, 79; Post, § 468.

[4] Post, § 488.

[5] Moreau & Carlton, Partid. 5, tit. 8, l. 26.

[6] Pothier, Traité de Dépôt, n. 77 to 81; Merlin, Repert. art. *Hotelier*, n. 4; Code Civil of France, art. 1952, 1953, 1954; Pardessus, Droit Comm. P. 2, tit. 6, ch. 3, art. 516; Code of Louisiana (1825), art. 2722, 2725, 2938, 2939.

[7] Ersk. Inst. B. 2, tit. 1, § 28; 1 Bell, Comm. p. 465 to 472, 5th edit.; 1 Bell, Comm. § 398 to 402, 4th edit.

[8] Code of Louisiana (1825), art. 2936 to 2939.

[9] Pothier, Traité de Dépôt, n. 75 to 81. But see Ante, § 466 *a*.

[10] Pothier, Traité de Dépôt, n. 96. Pothier, generally, when he uses the terms, *de la faut légère*, means ordinary neglect. Ante, § 65, note (3.) But in this place the sense may be what we call slight neglect. Ante, § 18. *Sed quære.*

keeper; for the theft is imputed to his negligence, if the goods are put into his custody,[1] unless he can clearly establish that the loss has been by irresistible force (*accident de force majeure*).[2] The same rule is applied where the goods of a guest are damaged while they are in the custody of the innkeeper. *Quæcunque de furto diximus, eadem et de damno debent intelligi; non enim dubitari oportet, quin is, qui salvum fore recipit, non solum a furto, sed etiam a damno recedere videatur.*[3]

§ 468 *a*. But if the goods are not so expressly put into the charge and custody of the innkeeper, he is responsible only in case the theft is proved to have been by his domestics or boarders, or by other persons in his service, and not where it has been by other guests or travellers, or by other persons unknown.[4] And the burden of proof, in such a case, is on the guest whose goods are stolen.[5] If the guest chooses to keep the goods in his own custody, or if he confides them to another person, not authorized by the innkeeper to receive them, the latter is discharged from all responsibility.[6] *Cæterum, si qui operâ mediastini fungitur, non continetur; utputa, atriarii et focarii, et his similes.*[7] In this class of deposits with innkeepers, parol evidence of the contract by witnesses is according to Pothier, admissible, contrary to the general rule of the French law, which requires a written contract where the value of the thing deposited exceeds one hundred livres.[8]

§ 468 *b*. The modern Code of France has, for the most part, followed the doctrines of Pothier. Innkeepers and masters of hotels are thereby held responsible, as depositaries, for the effects brought by travellers, who lodge with them; the de-

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[1] Pothier, Traité de Dépôt, n. 78, 79, 80; Ante, § 466 *a*.

[2] Pothier, Traité de Dépôt, n. 78.

[3] Dig. Lib. 4, tit. 9, l. 5, § 1; Pothier, Pand. Lib. 4, tit. 9, n. 8; Pothier, Traité de Dépôt, n. 78.

[4] Pothier, Traité de Dépôt, n. 79; Dig. Lib. 47, tit. 5, l. 1, § 6; Ante, § 466 *a*.

[5] Pothier, Traité de Dépôt, n. 79.

[6] Pothier, Traité de Dépôt, n. 80.

[7] Dig. Lib. 4, tit. 9, l. 1, § 5; Pothier, Pand. Lib. 4, tit. 9, n. 2.

[8] Pothier, Traité de Dépôt, n. 81. See also, the Code Civil of France, art. 1950, 1952, and the Code of Louisana of 1825, art. 2940, where a similar rule is adopted.

posit of such effects being treated as a deposit of necessity. And this responsibility extends, not only to the theft or damage of such effects, caused by the servants and domestics of the innkeeper, but also to that of strangers, coming into and going from the inn.[1] The Code of Louisiana is to the same effect.[2] By this latter code, also, the innkeeper is not responsible for what is stolen by force and arms, or by exterior breaking open of the doors, or by any other extraordinary violence; in other words, he is not responsible for losses by robbery or burglary.[3] The French Code, by making the innkeeper liable only as a depositary from necessity, has either directly or silently adopted the same rule.[4]

§ 469. The general principles of the Roman and foreign law upon this subject have been stated somewhat more at large, because they form a proper introduction to the doctrines of the common law upon this subject, in which the responsibility of innkeepers is said to be founded on the custom of the realm. In point of fact, the origin of the latter may be clearly traced up to the Roman law, from which the common law, without any adequate acknowledgments, has from time to time borrowed many of the important principles which regulate the subjects of contracts.

§ 470. By the common law innkeepers are bound to take, not merely ordinary care, but uncommon care, of the goods, money, and baggage of their guests; and they are responsible for the acts of their servants and domestics, as well as for the acts of other guests.[5] It has been remarked by Lord Holt, that, in the case of an innkeeper, a passenger pays nothing for the keeping of his goods in the inn, but pays only for his vict-

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[1] Code Civil of France, art. 1952, 1953.

[2] Code of Louisiana of 1825, art. 2936, 2938.

[3] Id. art. 2939.

[4] Code Civil of France, art. 1951, 1954.

[5] Jones on Bailm. 94; Com. Dig. *Action on the Case for Negligence*, B.; Kent *v.* Shuckard, 2 Barn. & Adolph. 803; Calye's Case, 8 Co. R. 32; 2 Kent, Comm. Lect. 40, p. 592, 593, 4th edit.; Post, § 481. There is a curious statement of the state of Inns, and the law respecting them and their keepers in Holinshed's Chronicles of England, Vol. I. Description of England, Book 3, ch. 16, p. 444, London edit. 4to, 1807. See Cashill *v.* Wright, 6 Ell. & Bl. 893.

uals and lodgings; and the reward which he pays for his victuals and lodgings entitles him to an action for the loss of his goods.[1] This, however, if it were the sole foundation on which the doctrine of the common law on this subject rests, would lead us to the conclusion, that the innkeeper was liable only for ordinary negligence, like other persons letting out their labor and services, and bestowing their custody on things for a reward.[2] But the common law adopts a different rule.[3] The Registrum Brevium states, by way of recital, the responsibility of innkeepers substantially in the following terms. That by the custom of the realm innkeepers are obliged to keep the goods and chattels of their guests, which are within their inns, without subtraction or loss, day and night, so that no damage, in any manner, shall thereby come to their guests, from the negligence of the innkeeper or his servants.[4] Although an innkeeper is not paid in money for securing a traveller's trunk, yet the guest *facit, ut faciat*, and alights at the inn, not solely for his own refreshment, but also that his goods may be safe.[5] Indeed, the custody of the goods may be considered as accessory to the principal contract; and the money paid for the apartments, as extending to the care of his box or portmanteau, or baggage.[6] If, therefore, the goods or baggage of the guest are damaged in the inn, or are stolen from it by the servants or domestics, or by another stranger guest, the innkeeper is bound to make restitution.[7] And the innkeeper cannot exonerate himself from this responsibility by a refusal to take any care of the goods, because there are suspected persons in his house,

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[1] Lane *v.* Cotton, 12 Mod. R. 483, 487; 2 Kent, Comm. Lect. 40, p. 592, 4th edit.

[2] Jones on Bailm. 94.

[3] Jones on Bailm. 94.

[4] Calye's Case, 8 Co. R. 32.

[5] Jones on Bailm. 94; Ante, § 464; 2 Kent, Comm. Lect. 40, p. 592, 4th edit.; Mason *v.* Thompson, 9 Pick. R. 280; Orange County Bank *v.* Brown, 9 Wend. R. 85, 114, 115.

[6] Jones on Bailm. 94; Lane *v.* Cotton, 12 Mod. R. 487; Ante, § 464.

[7] Jones on Bailm. 94, 95; 1 Black. Comm. 430; 2 Kent, Comm. Lect. 40, p. 592, 4th edit.; Com. Dig. *Action on the Case for Negligence*, B. 1, 2, 3; Calye's Case, 8 Co. R. 32; Epps *v.* Hinds, 27 Mississ. (5 Cushm.), 658.

for whose conduct he cannot be answerable; for the law will not permit him thus to escape from his own proper duty.[1] It might, indeed, be otherwise, if he refused admittance to a traveller, because he really had no room for him, and the traveller, nevertheless, should insist upon entering and placing his baggage in a chamber without the innkeeper's consent.[2] But, by the common law (which in this respect differs from the Roman law),[3] an innkeeper is not, if he has suitable room, at liberty to refuse to receive a guest, who is ready and able to pay him a suitable compensation.[4] On the contrary, he is bound to receive him, and if upon false pretences he refuses, he is liable to an action.[5] [But it may be questioned whether an innkeeper may not keep an inn for a certain class of persons only, as for those who travel without carriages; in which case he ought not to be liable for refusing to receive those of a contrary character. Such is now the undoubted rule as to carriers, and the like principle has been thought to extend to inkeepers.[6]]

§ 471. It is not necessary to prove that the goods have been lost by the negligence of the innkeeper; for it is his duty to provide honest servants and keep honest inmates, and to exercise an exact vigilance over all persons coming into his house, as guests or otherwise.[7] Nor is it necessary, that the goods should be in his special keeping; but it is generally sufficient, that they are in the inn under his implied care.[8] It has been

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[1] Jones on Bailm. 94; Anon. F. Moore, R. 78.

[2] Jones on Bailm. 94; Dyer, R. 158 b; 1 Anders. R. 29.

[3] Dig. Lib. 4, tit. 9, l. 1, § 1; Ante, § 464, 466 *a*.

[4] 1 Roll. Abridg. 3, F.; Bac. Abridg. *Inns & Innkeepers*, C.; Bennett *v.* Mellor, 5 Term R. 274; Thompson *v.* Lacy, 3 B. & Ald. 285; 3 Black, Comm. 166; Newton *v.* Trigg, 1 Shower, R. 270; Rex *v.* Kilderby, 1 Saund. R. 312 *c*; 1 Bell, Comm. p. 472, 5th edit.; 1 Bell, Comm. § 403, 404, 4th edit.; Hawthorn *v.* Hammond, 1 C. & K. 404; 2 Kent, Comm. Lect. 40, p. 592, 593, 594; Com. Dig. *Action on the Case for Negligence*, B. 1, 2.

[5] Ibid.; Rex *v.* Ivens, 7 Car. & P. 213.

[6] See Johnson *v.* Midland Railway Co. 4 Exch. R. 367; Parke, B. 371.

[7] Jones on Bailm. p. 95; Com. Dig. *Action on the Case for Negligence*, B. 1, 2; Bennett *v.* Mellor, 5 Term R. 276.

[8] Jones on Bailm. 95; Bennett *v.* Mellor, 5 Term R. 276; 1 Black. Comm. 450; 2 Kent, Comm. Lect. 40, p. 593, 594, 4th edit.; Calye's Case, 8 Co. R. 32; Epps *v.* Hinds, 27 Mississ. (5 Cushman), 658; Burgess *v.* Clements, 4 Maule & Selw. 306, 310; Packard *v.* Northcraft, 2 Met. (Ky.), 439.

observed by Sir William Jones: "Rigorous as this rule may seem, and hard as it may actually be in one or two particular instances, it is founded on the great principle of public utility, to which all private considerations ought to yield. For travellers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are none of the best, and who might have frequent opportunities of associating with ruffians and pilferers, while the injured guest would seldom or never obtain legal proof of such combinations, or even of their negligence, if no actual fraud had been committed by them."[1] This is the very reasoning of the Roman law on the same subject, founded on motives of public policy.[2]

§ 472. But innkeepers are not responsible to the same extent as common carriers.[3] The loss of the goods of a guest, while at an inn, will be presumptive evidence of negligence on the part of the innkeeper or of his domestics.[4] But he may, if he can, repel this presumption, by showing that there has been no negligence whatsoever;[5] or that the loss is attributable to the personal negligence of the guest himself;[6] or that

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[1] Jones on Bailm. 95, 96; 2 Kent, Comm. Lect. 40, p. 592, 593, 594, 4th edit.; Mason *v.* Thompson, 9 Pick. R. 280.

[2] Ante, § 464.

[3] The old form of the declaration stated the custom of the realm to be, that the innkeeper was bound to keep the goods and chattels of his guests without subtraction or loss by day and by night; so that, by reason of the default of the innkeeper or his servants, a damage should not happen in any manner to their guests. Calye's Case, 8 Co. R. 32; Ante, § 470.

[4] Jones on Bailm. 96; Bennett *v.* Mellor, 5 Term R. 276; Post, § 482; Hill *v.* Owen, 5 Blackford, R. 323.

[5] Metcalf *v.* Hess, 14 Illinois, 129; Merritt *v.* Claghorn, 23 Verm. 177; Kesten *v.* Hildebrand, 9 B. Monroe, 72; Dawson *v.* Chamney, 5 Ad. & Ell. N. S. 164. But see *contrà*, Shaw *v.* Berry, 31 Maine, 478; Mateer *v.* Brown, 1 California, 221; Washburn *v.* Jones, 14 Barb. 193; Sibley *v.* Aldrich, 33 N. H. R. 553, where the subject is ably examined by Perley, C. J.

[6] [And it would not be necessary for the innkeeper to show that his guest had been guilty of "gross negligence," if by that term is meant greater negligence than the absence of ordinary care, or which is said to amount to dolus. The rule of law resulting from all the authorities is, that the goods remain under the charge of the innkeeper and the protection of the inn so as to make

it has been occasioned by inevitable casualty or by superior force.[1] Thus, although a common carrier is liable for all losses occasioned by an armed mob (not being public enemies), an innkeeper is not (as it should seem) liable for such a loss.[2] [And on the same principle it has been held he is not liable for a loss by fire happening without any fault of himself or his servants.[3]] Neither is he liable (it should seem) for a loss by rob-

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the innkeeper liable as for a breach of duty, unless the negligence of the guest occasions the loss, in such a way as that the loss would not have happened, if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances. Ashill *v.* Wright, 6 El. & Bl. 890.]

[1] Jones on Bailm. 96; Burgess *v.* Clements, 4 Maule & Selw. 306; Calye's Case, 8 Co. R. 32; Dawson *v.* Chamney, 5 Adolph. & Ellis, N. S. 164; McDaniels *v.* Robinson, 26 Vermont, 337.

[2] Morse *v.* Slue, 1 Vent. R. 190, 238; Rich *v.* Kneeland, Cro. Jac. 330; S. S. Hob. 17; Lane *v.* Cotton, 12 Mod. R. 480; Jones on Bailm. 109.

[3] [Merritt *v.* Claghorn, 23 Vermont, 177. Redfield, J., said: "This is an action against the defendant, as a common innkeeper, for the loss of the plaintiff's team, while a guest at the defendant's house, by the burning of his barn, supposed to be the work of an incendiary.

"The case finds, that the plaintiff's loss was, without 'any negligence, in point of fact, in the defendant, or his servants.' From this we are to understand, that no degree of diligence, on his part, could have prevented the loss. If, then, the defendant is liable, it must be for a loss happening by a cause beyond his control. In saying this, we have reference only to the highest degree of what would be esteemed reasonable diligence, under the circumstances known to exist, before the fire occurred. We are aware, that it would doubtless have been possible, by human means, to have so vigilantly guarded these buildings, as probably to have prevented the fire. But such extreme caution, in remote country towns, is not expected, and if practised, as a general thing, must very considerably increase charges upon guests, which they would not wish to incur, ordinarily, for the remote and possible advantage which might accrue to them.

"The question, then, is, whether the defendant is liable? Do the authorities justify any such conclusion? For it is a question of authority mainly. We know that many eminent Judges and writers upon the law have considered, that innkeepers are liable to the same extent as common carriers. It may be true, that the cases are much alike in principle. For one, I should not be inclined to question that. But if the case were new, it is certainly not free from question, how far any Court would feel justified in holding any bailee liable for a loss like the present. But in regard to common carriers, the law is perfectly well settled, and they contract, with the full knowledge of the extent of their

bery and burglary by persons from without the inn.[1] This doctrine, however, seems to have been thought open to some open to some doubts, after the remarks of Mr. Justice Bayley,

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liability, and demand, not only pay for the freight, but a premium for the insurance, and may reinsure, if they choose. And the fact that carriers are thus liable, no doubt often induces the owners to omit insurance. But unless the law has already affixed the same degree of extreme liability to the case of innkeepers, we know of no grounds of policy merely, which would justify a Court in so holding.

"In regard to the authorities relied upon by the counsel for the plaintiff, the case of Bedlo *v.* Morris, Yelv. 162, decided as early as 7 Jac. 1, makes nothing either way upon this point. The declaration only claims, that the defendant is liable for 'goods lost, through the default of the defendant, or his servants;' and no case questions the liability to this extent. The dictum referred to in argument in the Doctor and Student, only shows, that innholders are liable for a robbery, committed upon their guests by the servants of the house. But this is upon the ground of want of proper care in keeping such servants. The host is, we apprehend, upon principles of reason and justice, always liable for any act of his servants, or guests. He employs such servants as he chooses, and is bound to take every quiet and orderly guest which offers, and if he takes others, even in good faith, it ought not to be at the risk of his other guests, who derive no profit and have no concern whatever in their being there. In holding the innkeeper liable to this extent, all opinions concur. It is here the discrepancy begins.

"Morse *v.* Slue, 1 Vent. 190, decides nothing, for the case was compounded. But the case was one of common carrier, by ship, as early as the 24 Car. 2, and doubts seem then to have existed, whether even common carriers were liable, without any default; but the law is clearly against them now upon that point. The declaration in this case seems to be much the same in substance as that in Yelverton, which is a ground of argument; perhaps the extent of the liability was then considered the same, which we should also infer from other parts of the case.

"Calye's Case, 8 Coke, 32 *a*, which is regarded as the leading case upon this subject among the earlier reports, certainly decides nothing more, than that the host is not liable for the horse of his guest, if put in the pasture by direction of the owner, and there stolen, which he probably would be, if put in the barn, for it would then be the folly and neglect of the hostler not to lock the barn. The numerous dicta in this case, as in most of the cases in my Lord Coke's Reports, go far beyond the case, and embody the leading principles of a brief treatise upon the subject. And these dicta have been regarded as authority, to some extent. But even that will not justify the present action. 'There ought to be

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[1] Jones on Bailm. 96; Burgess *v.* Clemens, 4 Maule & Selw. 306; Lane *v.* Cotton, 12 Mod. R. 487; Calye's Case, 8 Co. R. 32, 33; 2 Kent, Comm. Lect. 40, p. 592, 593, 4th edit.

who is reported to have said: "It appears to me, that the innkeeper's liability very closely resembles that of a carrier.

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a default in the innholder or his servants' (or may we not add guests?). But in the present case, there is no pretence of any such default.

"White's Case, 2 Dyer, 158 *b*, is where the house was full, and the guest undertook to shift for himself, being admitted as a matter of favor, and upon that condition, and the innkeeper was held not liable, even for robbery committed in the house, which he *primâ facie* clearly would be in ordinary cases, and ultimately, unless he could show that no degree of diligence on his part, which it was reasonable to require, could have prevented the robbery. The case of Saunders *v.* Spencer, 3 Dyer, 266, decides, that goods, which the guest declines to have locked up in a place pointed out to him, are at his own risk.

"It is certain, that Sir William Jones, in his treatise upon the liabilities of bailees, lays down no such extreme liability, on the part of innholders, as is here claimed. He is liable, says this writer, if the goods of a guest be stolen from his premises 'by any person whatever.' And he is liable for robbery, even, if committed by his servants or guests, but not if he take ordinary care, or the force was truly irresistible. This is the import of the rule laid down by Sir William Jones, and Mr. Justice Story adopts almost precisely the same view, in his valuable treatise upon bailments. The innkeeper is bound to the extremest degree of diligence, which any prudent man would be expected to resort to in defending his own goods, and is absolutely responsible for loss by his own servants or guests, and, *primâ facie*, for all losses.

"Chancellor Kent, 2 Comm. 592, lays down much the same rule. He says, the liability does not extend to loss occasioned by inevitable casualty, or by superior force, as robbery. A more extreme case of superior force than the present is scarcely supposable, or one more clearly within the reason of the rule, requiring extreme strictness in the care and responsibility of innholders.

"The American cases referred to in argument certainly do not decide what is necessary to maintain this action. Mason *v.* Thompson, 9 Pick. 280, involved no question of difficulty, except whether the defendant was liable at all, as a common innholder. The goods, being the plaintiff's harness, were confessedly lost, and nothing appeared, but that they were lost by the neglect of the defendant's servants. As a common innholder, this imposed the burden upon him to show that the loss occurred without his fault. This he did not attempt. It being settled that, under the circumstances, the defendant was liable as a common innholder, although the plaintiff was not at the time a lodger in the defendant's house, there remained no further doubt in the case.

"So, too, in Piper *v.* Manny, 21 Wend. 282, the goods were stolen from the plaintiff's load, which was left in the open yard of the inn by direction of the defendant's servants, and the defendant was held liable upon the most obvious principles of the law applicable to the subject. It is true, in both these cases, the opinion is broadly declared, that the liability of an innholder and a common carrier is the same. But the cases called for no such opinion, and no authority

He is *primâ facie* liable for any loss not occasioned by the act of God or the king's enemies; although he may be exonerated where the guest chooses to have his goods under his own care."[1] From which language it may, perhaps, be inferred, that the learned Judge would hold him responsible in cases of burglary and robbery. It may be, however, that he intended no more, than that the presumption of liability would prevail until expressly disproved by evidence, which should repel every imputation of negligence.[2] The case, however, did not call for the

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is cited for the opinion, and it is by no means certain, that those Judges would have so held, if it had been necessary to turn the case upon that naked question. No authority whatever is cited in the former case except by the reporter, who refers to Richmond *v.* Smith, 8 B. & C. 9, and that was only the case of goods stolen from the inn, and it was held, the innkeeper was *primâ facie* liable. And the Judges here say, that 'in this respect (that is, where goods are stolen) the situation of the landlord is precisely similar to that of a carrier.'

"But we find, that, when the very question comes before the English courts, as it did in Dawson *v.* Chamney, 5 Ad. & Ellis, N. S. 164, 48 E. C. L. 164, for the first time, so far as I can find, it was found necessary to put very essential qualifications upon the language of the Judges, as reported in the last case referred to. The doctrine of this case, as expressed in the note, is: 'When chattels have been deposited in a public inn, and there lost or injured, the *primâ facie* presumption is, that the loss or damage was occasioned by the negligence of the innkeeper or his servants. But this presumption may be rebutted; and if the Jury find in favor of the innkeeper, as to negligence, he is entitled to succeed on a plea of not guilty.'

"This rule, it is there shown very clearly, is founded upon the ancient common law liability of innkeepers, as set forth in the writ, taken from the *Registrum Brevium*, and found also in Fitzherbert's N. B. 94 B. Of the guests, it is said there, their 'goods being in those inns, without subtraction to keep night and day, are bound, so that for default of them, the innkeepers or their servants, damage may not come in any manner to such guests.'

"It is, perhaps, scarcely necessary to pursue this subject further. It is certain, no well-considered case has held the innkeeper liable in circumstances like the present. And no principle of reason, or policy, or justice, requires, we think, any such result, and the English law is certainly settled otherwise. We entertain no doubt, therefore, that the defendant is fairly entitled to have the judgment, which he obtained in the court below, affirmed."]

[1] Richmond *v.* Smith, 8 Barn. & Cress. 9; Mateer *v.* Brown, 1 California, 221.

[2] See what was said by the same learned Judge in Burgess *v.* Clements, 4 Maule & Selw. 306, 314.

dictum, and it has since been overturned by a solemn decision, if it meant to suggest so unqualified a proposition, as that the liability of innkeepers and common carriers is of the same extent, and subject only to the like exceptions.[1] In a still more recent case it has been laid down, in Massachusetts, that innkeepers, as well as common carriers, are regarded as insurers of the property committed to their care, and are bound to make restitution for any injury or loss, not caused by the act of God, or the common enemy, or the neglect or fault of the owner of the property.[2] This doctrine will clearly make innkeepers liable for losses by robbery or burglary by persons from without,[3] and also for losses occasioned by rioters and mobs.[4]

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[1] Dawson *v.* Chamney, 5 Adolph. & Ellis, N. S. 164. Lord Denman on this occasion said: "The doubt expressed by Bayley, J., in Richmond *v.* Smith, applies to another branch of the doctrine, namely, the exception from the rule which arises where the guest chooses to take the chattels entirely under his own care." In truth, however, Mr. Justice Bayley's dictum was not so qualified. He treated the responsibility of the innkeeper as like that of a carrier, to be for all losses not occasioned by the act of God or the king's enemies, adding another exception, that where the party took his goods into his own custody. [Dawson *v.* Chamney, was critically examined in the late case of Mateer *v.* Brown, 1 California, 221, and pronounced unsound. And see Shaw *v.* Berry, 31 Maine, 478; Thickstun *v.* Howard, 8 Blackf. 535.]

[2] Mason *v.* Thompson, 9 Pick. R. 280, 284. So also in Tennessee; Manning *v.* Wells, 9 Humphreys, R. 746.

[3] [But see McDaniels *v.* Robinson, 26 Vermont, 317.]

[4] [Mateer *v.* Brown, 1 California R. 221. Bennett, J., said: "It is claimed by the defendant that his house was burglariously entered, the barkeeper overcome by force, and the property carried off by robbers; and that these circumstances exonerate him from liability. The question, then, is, whether robbery from without, or burglary, will excuse an innkeeper for the loss of the goods of his guest; and the answer to it does not appear to be settled by the authorities.

"Chancellor Kent (2 Comm. 591), says that innkeepers are responsible to as strict and severe an extent as common carriers, while, in another place (id. 593), he limits their responsibility to losses occasioned otherwise than by inevitable casualty, or by superior force, as robbery. Judge Story, in his work on bailments (§ 472), says, that innkeepers are not responsible to the same extent as common carriers; that the loss of the goods of a guest while at an inn, will be presumptive evidence of negligence on the part of the innkeeper or of his domestics; but that he may, if he can, repel this presumption, by showing, that

§ 473. The innkeeper will also be exonerated by showing that the guest has been robbed by his own servant, or by one

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there has been no negligence whatever, or that the loss is attributable to the personal negligence of the guest himself; or that it has been occasioned by inevitable casualty or by superior force. Thus, he continues, although a common carrier is liable for all losses occasioned by an armed mob (not being public enemies), an innkeeper is not (*as it should seem*), liable for such a loss. Neither is he liable (*it should seem*), for a loss by robbery and burglary by persons from without the inn. It will be observed that the commentator advances this latter doctrine with some degree of hesitation and doubt, and in language which implies that he did not himself consider it as settled. Sir William Jones, in his essay on bailments (p. 94), says, it has long been holden that an innkeeper is bound to restitution, if the trunks or parcels of his guests, committed to him either personally or through his agents, be damaged in his inn, or stolen out of it by any person whatever; and yet, he says (p. 96), that it is competent for the innholder to repel the presumption of his knavery or default, by proving that he took *ordinary* care, or that the force which occasioned the loss or damage was truly irresistible.

"It thus appears, that while Judge Story leaves the point under consideration at loose ends, the two other distinguished commentators above cited are still more uncertain, as neither of them apparently agrees with himself; and from their opposing rules, it is difficult to determine to which side of the question they intended to adhere. The contradiction found in the writings of commentators, as well as the diversity which exists in the decisions on which their various statements are rested, seem to have sprung out of a departure from the principles on which the extraordinary liability of innkeepers and common carriers is based, and from what appears to be an erroneous construction put upon the doctrine laid down by Lord Coke in Calye's case (8 Rep. 32). Thus Judge Story and Chancellor Kent, in support of the position that an innkeeper is not liable for a loss of the goods of his guest occasioned by robbery and burglary, rely in part, at least, on the authority of Calye's case, while Sir William Jones cites no authority whatever in support of the strange proposition that the innholder may escape from responsibility by proving that he took *ordinary* care of the goods of his guest. Following in the track of the same departure from principle, in which commentators have wandered, are several decisions of recent date. Such are Burgess *v.* Clements, 4 M. & Selw. 306; and Dawson *v.* Chamney, 5 Adolph. & Ell. N. S. 164. The tenor of Calye's case, however, sanctions no such doctrine, although the particular passage in it, by which the lax rule of the responsibility of innkeepers is sought to be sustained, appears, at first sight, to be somewhat uncertain. It is there laid down, that the innholder shall not be charged, unless there be a *default* in him or his servants, in the *well and safe keeping and custody* of the guest's goods and chattels within his common inn; for the innkeeper is bound in law to *keep them safe*, without any stealing or purloining; and it is no excuse for the innkeeper to say, that he delivered

who came to the inn as the companion of the guest.[1] But it will be no excuse for the innkeeper, in case of a loss by theft,

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the guest the key of the chamber in which he is lodged, and that he left the chamber door open; but he *ought to keep the goods and chattels of his guest there in safety.* But if the guest's servant, or he who comes with him, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged; for there the fault is in the guest to have such companion or servant. So, also, if the innkeeper require his guest to put his goods in such a chamber under lock and key, and then he will warrant them, otherwise not, and the guest lets them lie in an outer court, where they are taken away, the innkeeper shall not be charged, for the fault is in the guest. Lord Coke is here commenting on the writ in the *Register Brevium*, which recites that, by the custom of the realm, innkeepers are obliged to keep the goods and chattels of their guests, which are within their inns, without subtraction or loss, day and night, so that no damage, *in any manner*, shall thereby come to their guests, from the *default* (*pro defectu*) of the innkeeper or his servants.

"The reasoning of Coke is simply this: The innkeeper is bound by law to keep the goods of his guest *safely;* if he does not perform this obligation, the law, which imposes on him the responsibility, declares him to be in default; but if the loss of the goods be ascribable to the fault of the guest, then the innkeeper is excused, for the words of the writ are *from the default of the innkeeper or his servants.* He makes no distinction between losses occasioned by superior force, by robbery by persons within the house and persons from without, by secret theft, or by an armed mob. On the other hand, he apparently discountenances the distinction; for he says, 'these words *absque subtractione seu omissione*, extend to all movable goods, although of them felony cannot be committed; for the words are not *absque felonicâ captione*, &c., but *absque subtractione*, &c.' It strikes us forcibly that the uncertainty and confusion which have been thrown over this branch of the law have arisen from confounding the word *defectu* in the writ, and the word default used by Lord Coke as its translation, with the term negligence; an error into which Judge Story himself seems to have fallen. (Story on Bailments, § 470.) The question of negligence does not, according to the language of the writ in the *Register Brevium* or the Commentary of Coke, constitute a subject for discussion in ascertaining the responsibility of innkeepers, any more than it does in ascertaining that of common carriers. The law requires of the former to keep the goods safely, as it does of the latter to carry them safely, and in case either fails, from any cause, to comply with this legal obligation, the law pronounces him in default, unless the loss be occasioned through the fault of the owner of the goods, or by the act of God, or by the public enemies. It seems, therefore, that the dictum of Mr. Justice Bayley in

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[1] Calye's case, 8 Co. R. 32; Bac. Abridg. *Inns & Innkeepers*, C. 4; Com. Dig. *Action on the Case for Negligence*, B. 2.

that he was sick, or insane, or absent from home at the time; for he is bound, in such cases, to provide faithful domestics and agents.[1]

Richmond *v.* Smith, 8 Barn. & Cress. 9, is a concise and accurate summary of the doctrine of Cayle's case. 'It appears to me,' he says, 'that the innkeeper's liability very closely resembles that of a carrier. He is *primâ facie* liable for any loss not occasioned by the act of God or the king's enemies; although he may be exonerated where the guest chooses to have his goods under his own care.' And although that dictum has been overturned in England by the subsequent decision in Dawson *v.* Chamney, 5 Adolph. & Ell. N. S. 164, we think the *dictum* right, and the decision wrong. Stephens, in his Commentaries (2 Comm. 133), says that an innkeeper is responsible for the goods and chattels brought by any traveller to his inn, in the capacity of guest there, in every case where they are lost, damaged, stolen, or taken by *robbery*, except where they are stolen by the traveller's own servant or companion, or from his own person, or from a room which he occupied as a mere guest, or entirely through his own gross negligence; and Mr. Chitty, in a note to Blackstone's Commentaries (1 Comm. 430, note 22), declares it to be long-established law, that the innkeeper is bound to restitution, if the guest is *robbed* in his house *by any person whatever;* unless it should appear that he was robbed under circumstances like those which, as above seen, constitute admitted exceptions. In the recent case of Mason *v.* Thompson, 9 Pick. 280, 284, it has been laid down in Massachusetts, that innkeepers, as well as common carriers, are regarded as *insurers* of the property committed to their care, and are bound to make restitution for any injury or loss, not caused by the act of God, or the common enemy, or the neglect or fault of the owner of the property. And in Grinnell *v.* Cook, 3 Hill, 488, Mr. Justice Bronson states the rule in the following words: 'The innkeeper is bound to receive and entertain travellers, and is answerable for the goods of the guest, although they may be stolen or otherwise lost *without any fault on his part.* Like a common carrier, he is an *insurer* of the property, and nothing but the act of God or public enemies will excuse a loss.' It thus appears that some Courts as well as commentators are, at length, returning to the sound and healthy principle of the common law, which places the liability of innkeepers and carriers on the same ground. And why should there be any distinction? 'Rigorous as the law in relation to innkeepers may seem,' says Sir William Jones (Bailments, 95, 96), 'and hard as it may actually be in one or two particular instances, it is founded on the great principle of public utility, to which all private considerations ought to yield; for travellers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are usually none of

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[1] Calye's case, 8 Co. R. 32; Com. Dig. *Action on the Case for Negligence*, B. 2.

§ 474. Having thus seen what is the general responsibility imposed upon innkeepers by the common law, it may be proper to consider: (1) who are deemed innkeepers in the sense of that law; (2) what are their general rights and duties; (3) who are properly to be deemed guests; (4) in respect to what goods, and under what circumstances, the liability of innkeepers attaches; (5) and lastly, under what circumstances they are exonerated by operation of law, or by the acts of the parties.

§ 475. (1) Who are deemed innkeepers. An innkeeper may be defined to be the keeper of a common inn for the lodging and entertainment of travellers and passengers, their horses and attendants, for a reasonable compensation.[1] It must be a common inn, or *diversorium*, that is, an inn kept for travellers generally (and not merely for a short season of the year, and for select persons, who are lodgers).[2] The language of the Registrum Brevium in describing innkeepers is: *Hospitatores, qui hospitia communia tenent ad hospitandos homines, per partes, ubi hujusmodi hospitia existunt transeuntes.*[3] But it is not necessary that the party should put up a sign as keeper of an inn. It is sufficient, if in fact he keeps an inn.[4] In a recent case it was said: "The true definition of an inn is a house where the traveller is furnished with every thing which he has occasion

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the best, and who might have frequent opportunities of associating with ruffians or pilferers, while the injured guest could seldom or never obtain legal proof of such combinations, or even of their negligence, if no actual fraud had been committed by them.' Now, these are the very reasons assigned by the law for the extraordinary responsibility imposed on common carriers; and, the reasons for the rule being the same in both cases, there is, in principle, no propriety in making a distinction. We think that an innkeeper is bound to keep the property of his guest safe from burglars and robbers without, as well as from thieves within, his house."]

[1] Bac. Abridg. *Inns & Innkeepers*, C.

[2] Calye's case, 8 Co. R. 32; Parkhurst *v.* Foster, Carth. 417; s. c. 5 Mod. R. 427; s. c. 1 Salk. R. 387; Lyon *v.* Smith, 1 Morris, 184; State *v.* Mathews, 2 Dev. & Bat. 424; Bonner *v.* Welborn, 7 Geo. 296; Bac. Abridg. *Inns & Innkeepers*, B.; 1 Bell, Comm. 469 to 472, 5th edit.; 1 Bell, Comm. § 403, 404, 4th edit.

[3] Calye's case, 8 Co. R. 32; Plowd. R. 9 *b*; Fitz. Nat. Brev. 94 *a*.

[4] Bac. Abridg. *Inns & Innkeepers*, B.

for whilst on his way."[1] [Or, as defined in a later case: a "public house of entertainment for all who choose to visit it."[2]] Therefore, where a house of entertainment was kept in London, in which the keeper provided lodgings and entertainment for travellers and others, it was held to be an inn, although it had no stables, and no stage-coaches or wagons stopped there.[3] But the keeper of a mere coffee-house is not deemed an innkeeper.[4] And a person who keeps a mere private boarding-house, or lodging-house, is in no just sense an innkeeper.[5]

§ 475 *a*. [The liabilities of a boarding-house keeper were much discussed in a late English case in the Queen's Bench.[6]

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[1] Thompson *v.* Lacy, 3 Barn. & Ald. 283; 2 Kent, Comm. Lect. 40, p. 594, 595, 4th edit.

[2] Wintermute *v.* Clark, 5 Sandf. Superior Ct. 247.

[3] Thompson *v.* Lacy, 3 Barn. & Ald. 283.

[4] Doe *v.* Laming, 4 Camp. R. 77. See Kisten *v.* Hildebrand, 9 B. Monr. 72. *Quære*, whether the keeper of a hotel, not being described as an innkeeper, is to be deemed an innkeeper. See Jones *v.* Osborn, 2 Chitty, R. 484; 1 Bell, Comm. p. 469, 5th edit.; 2 Kent, Comm. Lect. 40, p. 595, 596, 4th edit.

[5] 1 Bell, Comm. p. 469, 5th edit.; 1 Bell, Comm. § 402, 403, 4th edit.

[6] [Dansey *v.* Richardson, 25 Eng. Law & Eq. R. 76; 1 El. & Bl. 168. The declaration stated that the plaintiff had become a guest in the boarding-house of the defendant, upon the terms, amongst others, that the defendant would take due and reasonable care of the goods of the plaintiff whilst they were in the house of the defendant, for hire and reward, and it then became the duty of the defendant, by herself and servants, to take such care of the plaintiff's goods, whilst a guest in the defendant's house. Breach of the alleged duty, and a loss of the plaintiff's goods, by the neglect of the defendant and her servants. On the trial it appeared that the plaintiff had been received as a guest in the defendant's boarding-house, at a weekly payment, upon the terms of being provided with board, and lodging, and attendance. The plaintiff being about to leave the house, sent one of the defendant's servants to purchase some biscuits, and he left the front door ajar, and whilst he was absent on the errand a thief entered the house and stole a box of the plaintiff's from the hall. The learned Judge directed the Jury that the defendant was not bound to take more care of the house and the things in it than a prudent owner would take, and that she was not liable if there were no negligence on her part in hiring and keeping the servant; and he left it to the Jury to say whether, supposing the loss to have been occasioned by the negligence of the servant in leaving the door ajar, there was any negligence on the part of the defendant in hiring or keeping the servant. Held, by the

And it is now held, that the law imposes no obligation upon a lodging-house keeper to take care of the goods of his lodgers; and, accordingly, he is not responsible for a theft of them by a stranger who came in to view the rooms, which were about to be vacated by the plaintiff; although the plaintiff was then absent, and the stranger was allowed to look at the rooms by the defendant himself.[1]]

§ 476. (2) As to the rights and duties of innkeepers. An innkeeper is bound (as has been already said) to take in all travellers and wayfaring persons, and to entertain them, if he can accommodate them for a reasonable compensation; and he must guard their goods with proper diligence.[2] But he is not bound by law to furnish his guests with rooms to show their goods, but only with convenient lodging-rooms and lodging.[3] If an innkeeper improperly refuses to receive or provide for a guest, he is liable to be indicted therefor.[4] But he may not only refuse to receive a guest, who conducts himself in a disorderly and noisy manner, but he may compel him under such circumstances to leave the inn, even after he has

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Court, that at least it was the duty of the defendant to take such care of her house and the things of her guests in it as every prudent householder would take; and, by Lord Campbell, C. J., and Coleridge, J., that she was bound not merely to be careful in the choice of her servants, but absolutely to supply the plaintiff with certain things, and to take due and reasonable care of her goods; and that if there had been a want of such care as regarded the plaintiff's box, it was immaterial whether the negligent act was that of the defendant or her servant, though every care had been taken by the defendant in employing such servant; and, consequently, that the direction of the learned Judge was not correct; but, by Wightman, J., and Erle, J., that the duty of the defendant did not require that she should do more than take all requisite care to employ and keep none but trustworthy servants; and that if that had been done, the defendant was not liable for the single act of negligence on the part of the servant in leaving the door open; and, therefore, that the direction at the trial was right.]

[1] Holder *v.* Soulby, 8 J. Scott, N. S. 254; 98 E. C. L. R.

[2] Thompson *v.* Lacy, 3 Barn. & Ald. 283; 1 Bell, Comm. p. 472, 5th edit.; 1 Bell, Comm. § 402, 403, 404, 4th edit.; Grinnell *v.* Cook, 3 Hill, R. 485.

[3] Burgess *v.* Clements, 4 Maule & Selw. 306; s. c. 1 Stark. R. 251, n. See Fell *v.* Knight, 8 Mees. & Welsb. 269.

[4] Rex *v.* Ivens, 7 Carr. & Payne, 213.

been received as a guest.[1] [But he has no right to prevent a driver of a coach that is a rival to one which favors the innkeeper, from resorting to his house for reasonable purposes.[2]] The law invests an innkeeper with some peculiar privileges; for he has a lien upon the goods of his guest, for his board and lodging and the liquors supplied him.[3] [He also has a lien on the goods brought by his guest to the inn, although they are only hired by the guest of a third party; at least, if that fact be not known to the innkeeper.[4] But later cases have declared that if the innkeeper knows when the goods are brought, that they do not belong to his guest, he cannot detain them for his bill.[5]] And he is not bound to examine into the nature and extent of the articles ordered by his guest, or the propriety of supplying them with reference to his just wants, provided his guest be possessed of his reason, and he is not a minor, and the innkeeper is not guilty of any fraud or imposition.[6] If the horses of a traveller be left with an innkeeper in his inn, the innkeeper has a lien on the horses for their keep, even although the owner or traveller put up at a different place; for it is not essential to such right, or to the traveller's being liable for such keep, that he should be a guest at the inn.[7] [Although it is otherwise, if the horses be left with a livery stable keeper, although he may also keep an inn,[8]

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[1] Howell *v.* Jackson, 6 Carr. & Payne, 742; Rex *v.* Ivens, 7 Carr. & Payne, 213; Moriarty *v.* Brooks, 6 Carr. & Payne, 634.

[2] Markham *v.* Brown, 8 New Hamp. 523.

[3] Thompson *v.* Lacy, 3 Barn. & Ald. 287; Proctor *v.* Nicholson, 7 Carr. & Payne, 67; Jones *v.* Thurloe, 8 Mod. R. 172; Post, § 604; Grinnell *v.* Cook, 3 Hill, R. 485; Dunlap *v.* Thorne, 1 Rich. 213.

[4] [Johnson *v.* Hill, 3 Starkie, 172; Turrill *v.* Crawley, 13 Ad. & Ell. N. S. 197; a case of a chariot hired by the guest; Snead *v.* Watkins, 1 J. Scott (N. S.), 267, a case where an attorney's clerk brought a letter-book to the inn, which belonged to his principal.]

[5] Broadwood *v.* Granara, 10 Exch. 417; 28 Eng. Law & Eq. R. 443, and Bennett's note. See also, Carlisle *v.* Quattlebaum, 2 Bailey, 452; Fox *v.* McGregor, 11 Barbour, 41; Binns *v.* Pigot, 9 Carr. & Payne, 208.

[6] Proctor *v.* Nicholson, 7 Carr. & Payne, 67.

[7] Peet *v.* McGraw, 25 Wend. R. 654; Mason *v.* Thompson, 9 Pick. R. 280.

[8] Smith *v.* Dearlove, 6 Com. B. Rep. 132. And see Hickman *v.* Thomas, 16 Alabama, 666; Thickstun *v.* Howard, 8 Blackford, 535.

for the goods must have come into his possession in his character as innkeeper, and as belonging to his guest.] Travellers are also entitled to reasonable accommodation at the inn; but they are not entitled to select a particular apartment, or insist upon using a bedchamber for other purposes than that for which it is designed; as, for instance, to sit up therein all night, if the innkeeper is willing and offers to furnish them with a proper apartment for the purposes desired by the travellers.[1] It has been said, that the horse of a guest can be detained only for his own meals, and not for the meals and expenses of the guest.[2] The reason is said to be, that chattels are in the custody of the law for the debt which arises from the thing itself, and not for any other debt due from the same party; for the law is open to all such debts, and doth not admit private persons to make reprisal. This may be correct as to all other debts than the debt contracted by the party as a guest. But there seems great reason to doubt, whether the lien of the innkeeper does not extend to all the goods which the guest has at the inn, for all his expenses there. The general rule seems in favor of such a lien, whether any expense has been incurred on the particular goods or not. The cases cited to support the opposite doctrine do not seem to justify it.[3]

§ 476 *a*. It seems at one time to have been held, that an innkeeper had a lien upon the person of his guest, and the personal clothing then in wearing by him, for the amount due for the board, lodging, and other charges due to him.[4] But that doctrine is now entirely repudiated; and it is held that the lien does not extend to his person or personal clothing in

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[1] Fell *v.* Knight, 8 Mees. & Welsb. R. 269.

[2] Bac. Abridg. *Inns & Innkeepers*, D., which cites Rosse *v.* Bramsteed, 2 Roll. R. 439, and 2 Roll. Abridg. 85. These cases certainly do not support the doctrine.

[3] Bac. Abridg. *Inns & Innkeepers*, D., 2 Roll. Abridg. 85; Rosse *v.* Bramsteed, 2 Roll. R 439. See Thompson *v.* Lacy, 3 Barn. & Ald. 283; Sunbolf *v.* Alford, 1 Horn & Hurl. 13; s. c. 3 Mees. & Welsb. 248; Proctor *v.* Nicholson, 7 Carr. & Payne, 67; Jones *v.* Thurloe, 8 Mod. R. 172.

[4] Newton *v.* Trigg, 1 Shower, R. 270; Bac. Abridg. *Inns & Innkeepers*, D.

actual wear.[1] This latter doctrine seems founded in all the just analogies of the law applicable to cases of distress.[2]

§ 477. (3) Who are to be deemed guests. As inns are instituted for passengers and wayfaring men, a neighbor or friend, who is no traveller, but comes to the inn at the request of the innkeeper, and lodges there, is not deemed a guest.[3] But where a traveller comes to the inn, and is accepted, he becomes instantly a guest.[4] If a traveller leaves his horse at an inn, and lodges elsewhere, he will be deemed a guest.[5] But he will not be deemed a guest in such a case, if he leaves goods for which the innkeeper receives no compensation.[6] Therefore, where a person came to an inn with a hamper of hats, and went away, and left them there for two days, and in his absence they were stolen, it was held that he was not to be deemed a guest; and that the innkeeper was not liable for the loss thereof.[7] The length of time that a man is at an inn makes no difference; whether he stays a week, or a month, or longer; so always that, although he is not strictly *transiens*, he retains his character as a traveller.[8] [And if he still is in reality a

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[1] Sunbolf *v.* Alford, 1 Horn & Hurl. 13; s. c. 3 Mees. & Welsb. 248; Post, § 604. And see McDaniels *v.* Robinson, 26 Vermont, 335.

[2] Sunbolf *v.* Alford, 1 Horn & Hurl. 13; s. c. 3 Mees. & Welsb. 248; Post, § 604.

[3] Calye's case, 8 Co. R. 32, 33; Bac. Abridg. *Inns & Innkeepers*, C. 5; Com. Dig. *Action on the Case for Negligence*, B. 2.

[4] Calye's case, 8 Co. R. 32; Bac. Abridg. *Inns & Innkeepers*, C. 5.

[5] York *v.* Grindstone, 1 Salk. R. 388; s. c. 2 Ld. Raym. 866, by three Judges against Lord Holt; Gelley *v.* Clarke, Cro. Jac. 188; Mason *v.* Thompson, 9 Pick. R. 280; Peet *v.* McGraw, 25 Wend. R. 653. See the case of Mason *v.* Thompson, 9 Pick. R. 280, on this point discussed in Grinnell *v.* Cook, 3 Hill, R. 485. [See McDaniels *v.* Robinson, 26 Vermont, 316, where the subject is fully and ably examined by Redfield, C. J., and the rule of the text sustained. See further Wintermute *v.* Clark, 5 Sandf. (Superior Court), 242; Hickman *v.* Thomas, 16 Ala. 666; Thickstun *v.* Howard, 8 Blackf. 535; Smith *v.* Dearlove, 6 Com. B. Rep. 132; Washburn *v.* Jones, 14 Barbour, 193.]

[6] York *v.* Grindstone, 1 Salk. R. 388; s. c. 2 Ld. Raym. 866; Gelley *v.* Clarke, Cro. Jac. 188; Com. Dig. *Action on the Case for Negligence*, B. 1, 2; Orange County Bank *v.* Brown, 9 Wend. R. 114, 115.

[7] Gelley *v.* Clarke, Cro. Jac. 188; Bac. Abridg. *Inns & Innkeepers*, C. 5.

[8] Bac. Abridg. *Inns & Innkeepers*, C. 5; Com. Dig. *Action on the Case for Negligence*, B. 1, 2.

traveller, the making of a special agreement with the innkeeper for the price of his board by the week will not change his character as a guest, and make him a mere boarder.[1] But if a person comes upon a special contract to board, and sojourn at an inn, he is not, in the sense of the law, a guest; but he is deemed a boarder.[2] [And an innkeeper has no lien on his goods for his board.[3]] But if a person should come to an inn, and should leave his goods and horses there, and go to another town with intent to return to the inn, and afterwards he should return, and his goods or horses should in the mean time be stolen, the innkeeper will be responsible therefor: for such person will be deemed during all the time to be a guest.[4]

§ 478. (4) As to their liability. Innkeepers are liable only for the goods which are brought within the inn (*infra hospitium.*)[5] [Unless they also by their conduct assume the care of a traveller's goods before they reach the inn, as, where they furnish them a conveyance from a railway station to their hotel.[6]] If, therefore, an innkeeper at the request of his guest sends his horse to pasture, and the horse is stolen, the innkeeper is not, as such, liable for the loss.[7] The same rule would apply, if sheep should be put in a pasture by or under the direction of the guest, and they should be injured by eating poisonous plants.[8] But if the guest does not request it, but the innkeeper does it of his own accord, he is liable for the loss.[9] As he will also be, if the loss is occasioned by his own negligence or omission of duty.[10] However, it has been said, that this rule requires

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[1] Berkshire Woollen Co. *v.* Proctor, 7 Cushing, 417.

[2] Bac. Abridg. *Inns & Innkeepers*, C. 5.

[3] Ewart *v.* Stark, 8 Rich. 423.

[4] Gelley *v.* Clarke, Cro. Jac. 188. See Grinnell *v.* Cook, 3 Hill, R. 485; McDonald *v.* Edgerton, 5 Barbour, Supreme Ct. (N. Y.), R. 560.

[5] Calye's case, 8 Co. R. 32, 33; 2 Kent, Comm. Lect. 40, p. 592, 593, 4th edit.

[6] Dickinson *v.* Winchester, 4 Cush. 114.

[7] Ibid.; Calye's case, 8 Co. R. 32; Jones on Bailm. 91, 92, 94; 2 Kent, Comm. Lect. 40, p. 592, 4th edit.

[8] Hawley *v.* Smith, 25 Wend. R. 642.

[9] Ibid.; Com. Dig. *Action on the Case for Negligence*, B. 1, 2; Hawley *v.* Smith, 25 Wend. R. 642.

[10] Ibid.

some qualifications; for if it is the common custom of the country (as it is, in the summer season, in the interior towns of America), to put horses in such a case to pasture, the implied consent of the owner may be fairly presumed, if he knows the custom.[1] And the common usage of the country must have great weight in all such cases. In the country towns in America, it is very common to leave chaises and carriages under open sheds all night at inns; and also to leave the stable doors open or unlocked. Under such circumstances, if a horse or chaise should be stolen, it would deserve consideration, how far the innkeeper would be liable, as the traveller might be presumed to consent to the ordinary custom.[2]

§ 479. A delivery of the goods into the custody of the innkeeper is not necessary to charge him with them; for although the guest doth not deliver them or acquaint the innkeeper with them, still the latter is bound to pay for them, if they are stolen or carried away; even although the persons who stole them or carried them away are unknown.[3] Thus, if a traveller directs his horse to be put into the stable, and says nothing about the gig in which the horse is harnessed, and the gig and harness are left in a place out of the inn yard, with other carriages, and is stolen, the innkeeper will be held liable for the loss; for the gig will be deemed to be in his custody.[4] So, if goods are stolen from the chamber of the guest, and the guest gives no notice to the innkeeper that they are left there, he will be responsible for the loss, if they are stolen.[5] Nor is it any excuse for the innkeeper, that he delivered to the

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[1] 2 Kent, Comm. Lect. 40, p. 592, 4th edit.

[2] 2 Kent, Comm. Lect. 40, p. 592, 4th edit. See Dansey *v.* Richardson, 25 Eng. Law and Eq. R. 91; 1 El. & Bl. 168.

[3] Calye's case, 8 Co. R. 32; Quinton *v.* Courtney, Hayw. N. C. R. 41; Clute *v.* Wiggins, 14 Johns. R. 175; 1 Bell, Comm. p. 469, 5th edit.; 1 Bell, Comm. § 402, 403, 4th edit.; McDonald *v.* Edgarton, 5 Barbour, Supreme Ct. (N. Y.), R. 560.

[4] Jones *v.* Tyler, 3 Nev. & Mann. R. 576; s. c. 1 Adolph. & Ellis, R. 522; 2 Kent, Comm. Lect. 40, p. 582, note (d), 4th edit.; Mason *v.* Thompson, 9 Pick. R. 280.

[5] Kent *v.* Shuckard, 2 Barn. & Adolph. 803; Ante, § 470; 2 Kent, Comm. Lect. 40, p. 592 to 595, 4th edit.; Calye's case, 8 Co. R. 32, 33.

guest the key of the chamber in which he is lodged, and that the guest left the chamber door open.[1] But if the innkeeper requires of his guest, that he should put his goods into a particular chamber under lock and key, and that then he will warrant their safety, and otherwise not; and the guest, notwithstanding, leaves them in an outer court where they are taken away, the innkeeper will be discharged.[2] [A usage, however, at a particular inn for the guests to leave their money or valuables at the bar, or in the hands of the clerk, without any express direction from the innkeeper, is not binding upon any guest unless he be proved to have had actual knowledge thereof.[3]] And although an innkeeper refuses to take charge of goods for a party until another day; yet, if he admits him as a guest into his inn for temporary refreshments, and the goods are stolen while he is there, the innkeeper will be responsible for the loss.[4] If, indeed, the innkeeper had received the goods, and the party had gone away, and afterwards the loss had occurred, the innkeeper would have been liable only as a common bailee or depositary;[5] and if he had refused to receive the party as a guest, he would not have been liable at all.[6]

§ 480. Where the goods are delivered at the usual place for such goods at the inn, the innkeeper is chargeable with them, although not strictly within the inn. Thus, if wheat in a sleigh is put into the outer house, appurtenant to the inn and used for such purposes, and afterwards it is stolen, the innkeeper is liable for the loss.[7] So, if a horse is delivered to the

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[1] Calye's case, 8 Co. R. 32; Com. Dig. *Action on the Case for Negligence*, B. 1, 2.

[2] Calye's case, 8 Co. R. 32.

[3] Berkshire Woollen Co. *v.* Proctor, 7 Cushing, 417.

[4] Bennett *v.* Mellor, 5 T. R. 273; McDonald *v.* Edgerton, 5 Barbour, Supreme Ct. (N. Y.), R. 560.

[5] Post, § 487.

[6] Clute *v.* Wiggins, 14 Johns. R. 175; 2 Kent, Comm. Lect. 40, p. 593, 594, 595, 4th edit.

[7] Bennett *v.* Mellor, 5 Term R. 273; Com. Dig. *Action on the Case for Negligence*, B. 1, 2; 1 Bell, Comm. p. 469, 5th edit.; 1 Bell, Comm. § 402, 403, 404, 4th edit. But in Albin *v.* Presby, 8 New Hamp. R. 408, where a traveller, arriving at an inn, placed his loaded wagon under an open shed near the high-

ostler at the inn to be fed, and the ostler takes off the saddle and bridle, and deposits them in a barn belonging to the inn, and they are stolen, the innkeeper will be responsible for the loss.[1] So, if a horse and gig are driven to an inn and the horse is put up into the stable, and the traveller is received into the inn, but the gig is placed among other carriages in the open street (it being the day of a fair), without the inn-yard, where on days of the fair the innkeeper is accustomed to put the carriages of his guests, and the gig is stolen, the innkeeper is liable for the loss, and the place will be deemed to be for such occasions *infra hospitium*.[2]

§ 481. Although the general language of the Writ in the Register is, that the innkeeper is liable for the goods and chattels of the guest, which would seem not to extend to deeds, obligations, and choses in action; yet the latter are held movables within the custom to bind the innkeeper.[3] So, the innkeeper will be liable for the loss of the money of his guest stolen from his room, as well as for his goods and chattels.[4] [For his liability extends to all the movable goods and money of the guest placed within the inn, and is not confined to such articles and sums only as are necessary and designed for ordinary travelling expenses of the guest.[5]] But the innkeeper is

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way, and made no request to the innkeeper to take custody of it, and the goods were stolen from it in the night, it was held, that the innkeeper was not liable for the loss, notwithstanding it was usual to put loaded wagons in that place.

[1] Hallenbake *v.* Fish, 8 Wend. R. 547.

[2] Jones *v.* Tyler, 1 Adolph. & Ellis, R. 522; s. c. 3 Nev. & Mann. 576; 2 Kent, Comm. Lect. 40, p. 592, 593, 4th edit.; Ante, § 479.

[3] Calye's case, 8 Co. R. 32; Com. Dig. *Action on the Case for Negligence*, B. 1, 2.

[4] Kent *v.* Shuckard, 2 Barn. & Adolph. 803; Epps *v.* Hinds, 27 Missis. 658; Ante, § 470.

[5] [Berkshire Woollen Co. *v.* Proctor, 7 Cushing, 417, where $500 was stolen from the guest's room. The responsibility of innkeepers, said Fletcher, J., for the safety of the goods and chattels and money of their guests is founded on the great principle of public utility, and is not restricted to any particular or limited amount of goods or money. The law on this subject is very clearly and succinctly stated by Chancellor Kent, as follows: "The responsibility of the innkeeper extends to all his servants and domestics, and to all the movable goods and chattels and moneys of his guest, which are placed within the inn."

liable only for the safe custody of the personal property of his guest. He is not responsible for any tort or injury done by his servants or others to the person of his guest, without his own coöperation or consent.[1]

§ 482. (5) What circumstances will exonerate the innkeeper. By the common law, as laid down in Calye's case,[2] an innkeeper is not chargeable, unless there is some default in him, or in his servants, in the well and safe keeping and custody of his guest's goods and chattels within his common inn; but he is bound to keep them safe without any stealing or purloining. This doctrine, however, ought, perhaps, to be understood with this qualification, that the loss will be deemed *primâ facie* evidence of negligence; and that the innkeeper cannot exonerate himself, but by positive proof that the loss was not by means of any person for whom he is responsible, or was not of such a nature, as that he by law ought to be held responsible therefor.[3]

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2 Kent, Comm. 593. The liability of an innkeeper for the loss of the goods of his guest being founded, both by the civil and common law, upon the principle of public utility, and the safety and security of the guest, there can be no distinction, in this respect, between the goods and money. Kent *v.* Shuckard, 2 B. & Ad. 803; Armistead *v.* Wilde, 17 Q. B. 761, 6 Eng. Law & Eq. R. 349; Quinton *v.* Courtney, 1 Haywood, 40. The principle for which the defendants contend, that innkeepers are liable for such sums only, as are necessary and designed for the ordinary travelling expenses of the guest, is unsupported by authority, and wholly inconsistent with the principle upon which the liability of an innkeeper rests. The reasoning, both of the civil and common law, by which the doctrine of the liability of innkeepers, without proof of fraud or negligence, is maintained, is, that travellers are obliged to rely, almost entirely, on the good faith of innkeepers; that it would be almost impossible for them, in any given case, to make out proof of fraud or negligence in the landlord; and that therefore the public good and the safety of travellers require that innholders should be held responsible for the safe keeping of the goods of the guests. This reasoning maintains the liability of the innkeeper for the money of the guest, quite as strongly as his liability for goods and chattels, and it would be clearly inconsistent with the general principle upon which the liability is founded, to hold that the defendants were not responsible for the money lost in the present case. 2 Kent, Comm. 592 to 594; Story on Bailm. § 478, 481; Sneider *v.* Geiss, 1 Yeates, 35. See Simon *v.* Miller, 7 Louis. Ann. R. 360.]

[1] Ibid.

[2] 8 Co. R. 32, 33.

[3] Bennett *v.* Mellor, 5 Term R. 273; Burgess *v.* Clements, 4 Maule & Selw.

[Thus, the death of a horse, whilst in the care of an innkeeper, has been held sufficient to charge him with the loss, unless he can excuse himself by showing due care on his part.[1]]

§ 483. The innkeeper, however, may be exonerated in divers other ways; as, for example, by showing that the guest has taken upon himself exclusively the custody of his own goods, or has, by his own neglect, exposed them to the peril.[2] Thus, where a traveller had some boxes of jewelry, and desired a room to himself for the purpose of opening and showing it to customers; and he had the room assigned to him, and the key delivered to him, with directions about locking the door; and he used the room accordingly, and unpacked his jewelry; and he afterwards went away, and left the room for some hours, with the key in the lock on the outside of the door, and some of his boxes of jewelry were stolen; it was held, that the innkeeper was not liable, and that the guest, by accepting the key of the room, under the circumstances, had superseded the liability of the innkeeper to take care of the goods.[3] So, where a guest at an inn deposits his goods in a room, and makes use of it as a warehouse for them, having the exclusive possession of it, he is understood to take upon himself the exclusive charge of his own goods.[4] The same principle will apply, where a guest at an inn, instead of confiding his goods to the innkeeper, of choice commits them exclusively to the custody of another person, who is living at the inn.[5] [So where a person, after notice from the innkeeper that a safe was provided for money, and that he would not be responsible for their loss, unless deposited

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306; Ante, § 472. But see Richmond *v.* Smith, 8 Barn. & Cress. 9; Mason *v.* Thompson, 9 Pick. R. 280, 284.

[1] Hill *v.* Owen, 5 Blackford, R. 323.

[2] Calye's case, 8 Co. R. 32; 2 Kent, Comm. Lect. 40, p. 592, 593, 594, 4th edit.; Com. Dig. *Action on the Case for Negligence*, B. 1, 2; Armistead *v.* White, 6 Eng. Law & Eq. R. 349.

[3] Burgess *v.* Clements, 4 Maule & Selw. 306; s. c. 1 Stark. R. 251, n. See Stephenson *v.* The N. Y. & H. Railroad Co. 2 Duer, R. 341.

[4] Farnsworth *v.* Packwood, 1 Stark. R. 249; 2 Kent, Comm. Lect. 40, p. 592, 593, 594, 4th edit.

[5] Sneider *v.* Geiss, 1 Yeates, R. 34; Com. Dig. *Action on the Case for Negligence*, B. 1, 2.

therein, left $2,000 in gold coin in a trunk in his room during his absence to dinner in a hotel in New York city, he was held guilty of negligence and without remedy against the innkeeper, although he had locked the door, and handed the key to the innkeeper while he was at dinner, during which time the room and trunk were broken open and the money stolen.[1]]

§ 484. But if the habit of the servants at an inn is to place the guests' goods in their bedrooms, and a guest should request his to be carried into the common commercial room, to which travellers in general resort, and they are there stolen, the innkeeper will nevertheless be held responsible for the loss, unless he has given notice to the guest, that he will not be responsible, unless the goods are put into the bedroom.[2] [On the other hand, although it is the custom of travellers to leave their driving boxes in the commercial room, it may be such gross negligence in a traveller frequently to open his box and count his money in the presence of many persons in the room, and to leave his box so insecurely fastened as to open without a key, that the innkeeper will not be liable for a theft of the money.[3]] The mere exercise of the choice of a room or other place by the guest, which is not objected to, although it is for his own personal convenience, will not discharge the innkeeper from his general responsibility, if the guest does not thereby acquire an exclusive possession of the room or place. [And generally the room assigned to a traveller, by an innkeeper, is a proper place of deposit for his baggage.[4]]

§ 485. In many of the States of America, inns and taverns are governed by special statute regulations, and no persons are permitted to assume the business of keeping them, unless by particular license from the public authorities.[5] The common law, respecting the duties and liabilities of innkeepers, is understood, however, to prevail in all the United States, except

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[1] Purvis *v.* Coleman, 7 Smith (21 N. Y. R.), 111 (1860).

[2] Richmond *v.* Smith, 8 Barn. & Cress. 9. [In this case the innkeeper *assented* to the deposit of the package in the common commercial room.]

[3] Armistead *v.* White, 6 Eng. Law and Eq. R. 349; 17 Queen's Bench, 261.

[4] See Simon *v.* Miller, 7 Louis. Ann. R. 368.

[5] 2 Kent, Comm. Lect. 40, p. 596, 4th edit.

Louisiana, in which State the civil law constitutes the basis of its jurisprudence; and in so far as that law differs from the common law, it furnishes the rule for the government of all questions arising therein, in all cases in which the civil code of the State does not prescribe one.[1]

§ 486. There seems to be one peculiarity of the Roman law, which has no place in ours. If an innkeeper entertained a traveller gratuitously, he was still liable to him as a guest for all losses and damages, in the same manner as if he received a compensation. *Licet gratis navigaveris, vel in cauponâ gratis diverteris, non tamen in factum actiones tibi denegabuntur, si damnum injuriâ passus es.*[2] But in our law, it is apprehended that he would not be so liable, unless he was to receive a compensation.[3]

§ 487. The present head of inquiry may be closed by adding, that innkeepers are responsible for the loss of goods, only when they have been received by them in that character. If they have become bailees generally, they are then liable only according to the nature of the particular bailment or contract.[4] The same rule prevailed in the Roman law: *Eodem modo tenentur caupones et stabularii, quo exercentes negotium suum recipiunt; sed si extra negotium receperint, non tenebuntur.*[5] There is a decision in the Scottish law, quoted by Mr. Bell, which seems at variance with this doctrine. There, a parcel containing money was given to an innkeeper to be sent by a carrier or coach going from his house; and it was subsequently missing, and the money stolen; and the innkeeper was held responsible; but upon what ground does not distinctly appear.[6] It may also be added, that an innkeeper is not liable to third persons

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[1] Code of Louisiana of 1825, art. 31, 32, 33.

[2] Dig. Lib. 4, tit. 8, l. 6; Pothier, Pand. Lib. 4, tit. 9, n. 4.

[3] Bac. Abridg. *Inns*, C. D.; Calye's case, 8 Co. R. 32; Thompson *v.* Lacy, 3 Barn. & Ald. 285; Com. Dig. *Action on the Case for Negligence*, B. 1, 2.

[4] Dig. Lib. 4, tit. 9, l. 3, § 2; Hyde *v.* Trent & Mersey Nav. Co. 5 Term R. 389; Com. Dig. *Action on the Case for Negligence*, B. 2; Post, § 535.

[5] Dig. Lib. 4, tit. 9, l. 3, § 2; Pothier, Pand. Lib. 4, tit. 9, n. 3.

[6] 1 Bell, Comm. 469, and note (5), 5th edit. citing Williamson *v.* White, 15 Fac. Decis. 712.

for any washing of the clothing of his guests; but it is a personal charge upon the guest.[1]

ART. VIII. COMMON CARRIERS.

§ 488. (3) In the next place as to COMMON CARRIERS. It has been already stated, that the Roman law imposed by the Prætor's Edict the same responsibility upon innkeepers, shipmasters, and stable-keepers.[2] Whatever, therefore, has been said under the preceding head, as to the rights, duties, and obligations of innkeepers by the Roman law, applies with equal force to the rights, duties, and obligations of carriers by water under the same law.[3] In the modern countries governed by the Roman law the same rule is generally, if it is not invariably, adhered to. It may be clearly traced in the jurisprudence of France, Spain, Holland, Scotland, Louisiana, and the German States.[4] The case of carriers by land, at least in modern times, seems not to have been distinguished from that of carriers by water.[5] So that the responsibility of common carriers under the foreign law may be summed up in the following brief statement. They are responsible for theft and damage caused by their servants, or by others in their employ and confidence, or under their protection; but they are not responsible for thefts committed with armed force or other superior power; and, of course, they are exempted from losses by mere accident, and inevitable casualty.[6]

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[1] Callard *v.* White, 1 Stark. R. 171.

[2] Ante, § 458.

[3] Dig. Lib. 4, tit. 9, l. 1 to 7; Pothier, Pand. Lib. 4, tit. 9, n. 1 to 10; 1 Domat, B. 1, tit. 16, § 1 and 2 per tot.

[4] Pardessus, Droit Comm. P. 2, tit. 7, ch. 5, art. 537 to 555; Code Civil of France, art. 1782, 1786, 1952; Moreau & Carlton, Partidas 5, tit. 8, l. 26; Ersk. Inst. B. 3, tit. 1, § 28; 1 Bell, Comm. p. 465, 466, 5th edit.; Abbott on Shipp. p. 3, ch. 3, § 3, note (l); 1 Voet. ad Pand. Lib. 4, tit. 9; Code of Louisiana of 1825, art. 2722 to 2725; Ante, § 467.

[5] Ibid.; Merlin, Repertoire, *Voiture, Voiturier;* 1 Bell, Comm. p. 467, 5th edit.; 1 Bell, Comm. § 398 to 404, 4th edit.; Ante, § 458.

[6] Code Civil of France, art. 1782, 1784, 1952, 1953, 1954; Elliott *v.* Rossell, 10 Johns. R. 1.

§ 489. By the common law, as understood in the reign of Henry the Eighth, a responsibility of the like extent and nature seems to have existed in England; for it is said that at that time a common carrier was held chargeable in cases of a loss by robbery, only when he had travelled by roads dangerous for robbery, or had driven by night, or at any inconvenient hour.[1] However this may be, it is certain that in the commercial reign of Elizabeth a different rule prevailed;[2] and the doctrine has for a great length of time been firmly established, that a common carrier is responsible for all losses, except those occasioned by the act of God, or of the king's enemies.[3] By the act of God, a phrase which, perhaps, habit has rendered too familiar to us, is meant inevitable accident or casualty;[4] [but some declare that there is a distinction between "act of God" and "inevitable accident," and that the former means a natural necessity, such as winds and storms, which arise solely from *natural* causes[5]]; and by the king's enemies is meant public enemies, with whom the nation is at open war.[6]

§ 490. The reason assigned by Lord Holt for this doctrine is as follows: "The law," says he, "charges this person (the carrier), thus intrusted to carry goods, against all events, but acts of God and of the enemies of the king. For, though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their dealings. For else these carriers might have an opportu-

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[1] Jones on Bailm. 103; Doctor and Student, Dial. 2, ch. 38; Abbott on Shipp. P. 3, ch. 3, § 3, note (l); Noy's Maxims, ch. 43, p. 93.

[2] 1 Inst. 89; Moore, R. 462; 2 Roll. Abridg. 2; Jones on Bailm. 103; Proprietors of Trent Navigation *v.* Wood, 3 Esp. R. 127.

[3] See Mershon *v.* Hobensack, 2 Zabriskie (N. J.), R. 372; Friend *v.* Woods, 6 Gratt. 189.

[4] Jones on Bailm. 104, 105. See Fish *v.* Chapman, 2 Kelly (Ga.), R. 349; Neal *v.* Saunderson, 2 Sm. & Mar. 572; Walpole *v.* Bridges, 5 Blackf. 222.

[5] See Trent & Mersey Navigation Co. *v.* Wood, 4 Dougl. 290; McArthur *v.* Sears, 21 Wend. 198.

[6] Abbott on Shipp. P. 3, ch. 4, § 3; Ante, § 25.

nity of undoing all persons, that had any dealings with them, by combining with thieves, &c.; and yet doing it in such a clandestine manner, as would not be possible to be discovered. And this is the reason the law is founded upon in that point."[1] The ground of the resolution is (as Sir William Jones has justly observed) not the reward of the carrier (upon which Sir Edward Coke lays much stress), but the public employment exercised by the carrier, and the danger of his combining with robbers to the infinite injury of commerce, and extreme inconvenience to society.[2] He is treated as an insurer against all but the excepted perils,[3] upon that distrust, which an ancient writer has called the sinew of wisdom.[4] In truth, the reason or policy of the rule is borrowed from the Roman law, where (as we have already seen) the rule is applied equally to carriers by water, to innkeepers, and to stable-keepers;[5] but it is applied with a stricter severity in the common law, than it was in that law.[6]

§ 491. The subject was discussed with great force and point in a modern case,[7] where Mr. Chief Justice Best elaborately examined the policy and foundation of the rule in all its bearings upon the commercial interests of the country. His language on that occasion was as follows: "When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows, or sends any servants with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants; and they,

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[1] Coggs *v.* Bernard, 2 Ld. Raym. 909, 918; The Maria & Vrow Johanna, 4 Rob. Adm. R. 348, 352. See Orange County Bank *v.* Brown, 9 Wend. R. 114, 115.

[2] Jones on Bailm. 103, 104.

[3] Forward *v.* Pittard, 1 Term R. 27.

[4] Jones on Bailm. 107; 1 Bell, Comm. p. 461, 464, 466, 467, 5th edit.; 1 Bell, Comm. § 398 to 404, 4th edit.

[5] Ante, § 464.

[6] 2 Kent, Comm. Lect. 40, p. 597, 598, 4th edit.

[7] Riley *v.* Horne, 5 Bing. R. 217.

knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer. From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country, when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, namely, the act of God, and the king's enemies."

§ 492. In questions, therefore, as to the liability of a carrier, the point ordinarily is not so much, whether he has been guilty of negligence or not, as whether the loss comes within either of the excepted cases.[1] Not but that, if the carrier is actually guilty of negligence, he will be liable for a loss, which otherwise might be deemed a loss by an inevitable casualty.[2] Thus, if a barge-master should rashly shoot a bridge, when the bent of the weather is tempestuous, and a loss should ensue, he would be chargeable on account of his temerity and imprudence.[3] But it would be otherwise, if, using all proper precautions, he should shoot a bridge at a proper time, and the barge should be driven by the force of the current or by the wind against a pier, and thereby the goods should be lost; for then it would be esteemed a loss by mere casualty.[4] The consideration of questions of this sort, however, will find a more proper place hereafter.[5]

§ 492 *a*. But although the rule is thus laid down in general terms at the common law, that the carrier is responsible for all

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[1] Abbott on Shipp. P. 3, ch. 4, § 1; Gosling *v.* Higgins, 1 Camp. R. 451; McArthur *v.* Sears, 21 Wend. R. 190.

[2] Ante, § 413 *a* to 413 *d*, 516 to 519; Abbott on Shipp. P. 3, ch. 4, § 1; Jones on Bailm. 122; Lyon *v.* Mells, 5 East, R. 428; Goff *v.* Clinckhard, cited 1 Wils. R. 282; Elliott *v.* Rossell, 10 Johns. R. 1; 1 Bell, Comm. 463, 464, 469, 470, 5th edit.; 1 Bell, Comm. § 397 to 403, 4th edit.; Ante, § 122, 189, 259, 413, 413 *a* to 413 *d*; Post, § 509.

[3] Jones on Bailm. 107; Amies *v.* Stevens, 1 Str. 128. See Clark *v.* Barnwell, 12 Howard, U. S. R. 272.

[4] Ibid.

[5] Post, § 510 to 526.

losses not occasioned by the act of God, or of the king's enemies; yet it is to be understood in all cases that the rule does not cover any losses, not within the exception, which arise from the ordinary wear and tear and chafing of the goods in the course of their transportation, or from their ordinary loss, deterioration in quantity or quality in the course of the voyage, or from their inherent natural infirmity and tendency to damage, or which arise from the personal neglect, or wrong, or misconduct of the owner or shipper thereof.[1] Thus, for example, the carrier is not liable for any loss or damage from the ordinary decay or deterioration of oranges or other fruits in the course of the voyage, from their inherent infirmity or nature, or from the ordinary diminution or evaporation of liquids, or the ordinary leakage from the casks in which the liquors are put,[2] in the course of the voyage, or from the spontaneous combustion of goods, or from their tendency to effervescence or acidity, or from their not being properly put up and packed by the owner or shipper; for the carrier's implied obligations do not extend to such cases.[3]

§ 493. The rigor of the common law as to carriers has in several cases been relaxed in England by statute, and especially in the case of the owners of ships.[4] None of these statutes

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[1] 3 Kent, Comm. Lect. 48, p. 299, 300, 301, 4th edit.; Post, § 512 *a*, 516 to 520, 576; Hastings *v.* Pepper, 11 Pick. R. 41, 42; Post, § 579.

[2] [Especially where the leakage arises from an imperfect bung in the cask. Hudson *v.* Baxendale, 2 Hurl. & Norm. 575. In Stewart *v.* Crawley, 2 Stark. 323, where a carrier was held liable for the loss of a dog tied only with a string, Lord Ellenborough said the case was not "like that of the delivery of goods imperfectly packed, since in such case the defect was not visible."]

[3] 2 Kent, Comm. Lect. 48, p. 299, 300, 301, 4th edit.; Abbott on Shipp. P. 3, ch. 3, § 9, 5th edit.; Id. P. 3, ch. 4, § 1 to 6; Whalley *v.* Wray, 3 Esp. R. 74; Brind *v.* Dale, 8 Carr. & Payne, 207, 211; Hastings *v.* Pepper, 11 Pick. R. 41, 42; Brown *v.* Clayton, 12 Georgia, 566. See Warden *v.* Green, 6 Watts, 424; Leech *v.* Baldwin, 5 Watts, 446; Lamb *v.* Parkman, Sprague's Dec. 343; Clark *v.* Barnwell, 12 How. 280. [He is liable for an injury to flour, caused by the effluvium of spirits of turpentine, in the absence of any usage to carry such articles as part of the same cargo. The Bark Colonel Ledyard, Sprague's Dec. 530; Gillespie *v.* Thompson, 6 El. & Bl. 478, note; Alston *v.* Herring, 11 Exch. R. 822.]

[4] 7 Geo. 2, ch. 15; 26 Geo. 3, ch. 86; 53 Geo. 3, ch. 159; 6 Geo. 4, ch. 125;

seem to have been generally adopted in America; and, with the exception of some legislative provisions on the subject, in few States, we are now left to the common law, as the only guide to regulate our inquiries and conclusions.[1]

§ 494. Let us then consider, (1) Who are deemed common carriers at the common law. (2) What are their duties and obligations. (3) What are the risks for which they are liable at the common law. (4) The commencement and termination of their risks. (5) The effect of special contracts and notices. (6) What will excuse or justify a non-delivery of the goods. (7) The doctrine of average and contribution. (8) And lastly, the general rights of carriers.

§ 495. First. Who are deemed common carriers. It is not (as we have seen) every person who undertakes to carry goods for hire that is deemed a common carrier.[2] A private person may contract with another for the carriage of his goods, and incur no responsibility beyond that of any ordinary bailee for hire, that is to say, the responsibility of ordinary diligence.[3] To bring a person within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation *pro hac vice*.[4]

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1 Will. 4, ch. 68; 1 Bell, Comm. p. 561, 562, 5th edit.; 2 Kent, Comm. Lect. 40, p. 605, 606, 608, 4th edit.

[1] 2 Kent, Comm. Lect. 40, p. 605, 606, 4th edit.; 3 Kent, Comm. Lect. 47, p. 217, 4th edit.; Stokes *v.* Saltonstall, 13 Peters, R. 181, 191. See Revised Statutes of Massachusetts, 1836, ch. 32, § 1 to 4.

[2] Ante, § 457. See Gordon *v.* Hutchinson, 1 Watts & Serg. R. 285; Blanchard *v.* Isaacs, 3 Barbour, Supreme Ct. (N. Y.), R. 388.

[3] Bac. Abridg. *Carrier*, A.; 2 Kent, Comm. Lect. 40, p. 597, 598, 4th edit.; Robinson *v.* Dunmore, 2 Bos. & Pul. 417; Hodgson *v.* Fullarton, 4 Taunt. R. 787; Hutton *v.* Osborne, 1 Selw. N. P. 420 (11th edit.); Jones on Bailm. 121; Satterlee *v.* Groat, 1 Wend. R. 272; Hatchwell *v.* Cooke, 6 Taunt. R. 577; Ante, § 457.

[4] Gisbourn *v.* Hurst, 1 Salk. R. 219; Satterlee *v.* Groat, 1 Wend. R. 272; 1 Bell, Comm. 467, 5th edit.; 1 Bell, Comm. § 399, 4th edit.; Citizens' Bank *v.* Nantucket Steamboat Co. 2 Story, R. 17. In Fish *v.* Chapman, 2 Kelly (Ga.), R. 353, Nisbit, J., said: "It is from these definitions and from the two propositions stated, that we are to determine what constitutes a person a common car-

A common carrier has, therefore, been defined to be one who undertakes for hire or reward[1] to transport the goods of such

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rier. I infer, then, that the business of carrying must be habitual and not casual. An occasional undertaking to carry goods will not make a person a common carrier; if it did, then it is hard to determine who, in a planting and commercial community like ours, is not one; there are few planters in our own State owning a wagon and team, who do not occasionally contract to carry goods. It would be contrary to reason, and excessively burdensome, nay, enormously oppressive, to subject a man to the responsibilities of a common carrier, who might once a year or oftener at long intervals, contract to haul goods from one point in the State to another. Such a rule would be exceedingly inconvenient to the whole community, for if established, it might become difficult in certain districts of our State to procure transportation.

"The undertaking must be general and for all people indifferently. The undertaking may be evidenced by the carrier's own notice, or practically by a series of acts, by his known habitual continuance in this line of business. He must thus assume to be the servant of the public, he must undertake for all people. A special undertaking for one man does not make a wagoner, or anybody else, a common carrier. I am very well aware of the importance of holding wagoners in this country to a rigid accountability; they are from necessity greatly trusted, valuable interests are committed to them, and they are not always of the most careful, sober, and responsible class of our citizens. Still the necessity of an inflexible adherence to general rules we cannot and wish not to escape from. To guard this point therefore, we say, that he who follows wagoning for a livelihood, or he who gives out to the world in any intelligible way that he will take goods or other things for transportation from place to place, whether for a year, a season, or less time, is a common carrier and subject to all his liabilities.

"One of the obligations of a common carrier, as we have seen, is to carry the goods of any person offering to pay his hire; with certain specific limitations this is the rule. If he refuse to carry, he is liable to be sued, and to respond in damages to the person aggrieved, and this is perhaps the safest test of his character. By this test was Mr. Fish a common carrier? There is no evidence to make him one but his contract with Chapman & Ross. Suppose that after executing this contract, another application had been made to him to carry goods, which he refused, could he be made liable in damages for such refusal upon this evidence? Clearly not. There is not a case in the books, but one, to which I shall presently advert, which would make him liable upon proof of a single carrying operation.

"The extent of his liability, and his inability to vary that liability by notice

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[1] [It is necessary that the carriage be for hire and reward; for if it be gratuitous, the carrier is not liable, as a common carrier, although such is his business, but only for ordinary diligence. Fay *v.* Steamer New World, 1 Calif. 348.]

as choose to employ him from place to place.[1] [It may be from a place within the realm to a place out of it.[2]] Although

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or special acceptance, is another test. A common carrier is liable at all events, but for the act of God and the king's enemies; and he cannot limit or vary that liability. Whereas a carrier for hire in a particular case, is only answerable for ordinary neglect, unless he by express contract assumes the risk of a common carrier; his liability may be regulated by his contract. We do not think this undertaking would give to Mr. Fish that character which would preclude him from defining his liability in any other contract. By this contract, he may be liable *pro hac vice* as a common carrier, for that is a different thing.

"Upon these views we predicate the opinion, that the plaintiff in error was not a common carrier. From the way in which the opinion of the Court is expressed in the bill of exceptions, I am left somewhat in doubt whether the able Judge presiding in this cause, intended to say that the plaintiff in error was a common carrier, or that under his contract he was liable as such. If the former, we think he erred; and if the latter, as we shall more fully show, we think with him. In either event we shall not send the case back; for if he meant to say that the plaintiff upon general principles was a common carrier, thinking as we do that he is liable under this contract as such, he will not be benefited by the case going back.

"In conflict with these views, it has been held in Pennsylvania, that 'a wagoner who carries goods for hire, is a common carrier, whether transportation be his principal and direct business, or an occasional and incidental employment.' Gibson, Chief Justice, in Gordon *v.* Hutchinson, 1 Watts & Serg. R. 285. This decision no doubt contemplates an undertaking to carry generally, without a special contract, and does not deny to the undertaker the right to define his liability. There are cases in Tennessee and New Hampshire which favor the Pennsylvania rule, but there can be but little doubt that that case is

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[1] Alexander *v.* Green, 7 Hill, R. 544; Sheldon *v.* Robinson, 7 New Hamp. R. 157, 163; Elkins *v.* Boston & Maine R. R. Co. 3 Foster, R. 275; Samms *v.* Stewart, 20 Ohio, 71; Tunnel *v.* Pettijohn, 2 Harringt. 48; Blanchard *v.* Isaacs, 3 Barbour, Supreme Ct. (N. Y.), R. 388; Dwight *v.* Brewster, 1 Pick. R. 50, 53; Verner *v.* Sweitser, 32 Penn. St. R. 212; Fuller *v.* Bradley, 24 Penn. St. R. 120; Gisbourne *v.* Hurst, 1 Salk. R. 249, 250; 2 Kent, Comm. Lect. 40, p. 598, 4th edit. It is not necessary that the "hire" should be for a fixed sum. It is sufficient, if the compensation be a *quantum meruit*, inuring to the benefit of the owners. Nor is it necessary that the contract should be evidenced by a writing. Citizens' Bank *v.* Nantucket Steamboat Co. 2 Story, R. 16.

[2] Benett *v.* Peninsular, &c., Steamboat Co. 6 Manning, Granger, & Scott, R. 787; Crouch *v.* London & Northwestern Railway Co. 25 Eng. Law & Eq. R. 287.

the expression used is a common carrier of goods; yet this language is not to be understood in a strict sense, for a common carrier may be of money as well as of goods, and he will be bound as such for the carriage of money as well as of goods, if such is his own practice, or the common usage of the business in which he is engaged.[1]

§ 496. Common carriers are generally of two descriptions: (1) Carriers by land; (2) Carriers by water. Of the former description are the proprietors of stage-wagons, [omnibuses,[2]] stage-coaches, and railroad-cars, which ply between different places and carry goods for hire.[3] So are truckmen, wagoners,

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opposed to the principles of the common law, and its rule wholly inexpedient. See Story on Bail. § 457, 495; Bac. Ab. Carrier, A.; 2 Bos. & Pul. 417; 4 Taunt. 787; Jones on Bail. 121; 1 Wend. R. 272; 6 Taunt. R. 577; 2 Kent, 597.

"Assuming then that Mr. Fish was not a common carrier, what is he? This is a bailment for hire, '*locatio operis mercium vehendarum;*' the fifth in the learned classification of bailments made by Holt, C. J., in Coggs *v.* Bernard. Mr. Fish is a private person contracting to carry for hire. The next question is, what are his liabilities? And this brings us to the main point of error charged upon the Court below, and that is, that it erred in ruling that according to his contract the plaintiff in error was liable as a common carrier. In all cases of carrying for hire by a private person, we state that he is bound to ordinary diligence and a reasonable exercise of skill, and is not responsible for any losses not occasioned by ordinary negligence, *unless he has expressly by the terms of his contract taken upon himself such risk.* Story on Bail. § 457; 2 Ld. Raym. 909, 917, 918; 4 Taunt. R. 787; 6 Taunt. R. 577; 2 Marsh. R. 293; Jones on Bailm. 103, 106, 121; 1 Bell, Comm. 461, 463, 467; 2 Bos. & Pul. 416; 8 Car. & Payne, 207; 2 Kent, 597."]

[1] Kemp *v.* Coughtry, 11 Johns. R. 109; Tyly *v.* Morrice, Carth. R. 485; Post, § 530; Allen *v.* Sewall, 2 Wend. R. 327; s. c. 6 Wend. R. 335; Russell *v.* Livingston, 19 Barb. R. 346. See Citizens' Bank *v.* Nantucket Steamboat Co. 2 Story, R. 16, where the whole question is thoroughly commented upon by Mr. Justice Story.

[2] Dibble *v.* Brown, 12 Georgia, R. 217.

[3] Post, § 409; Coggs *v.* Bernard, 2 Ld. Raym. 909, 918; Jones on Bailm. 104, 106; Garside *v.* Trent and Mersey Navigation Co. 4 T. R. 582; Hyde *v.* Trent & Mersey Navigation Co. 5 T. R. 389; Forward *v.* Pittard, 1 T. R. 27; 2 Kent, Comm. Lect. 40, p. 598, 599, 4th edit.; Gordon *v.* Little, 8 Serg. & Rawle, 533; Bac. Abridg. *Carriers*, A.; 1 Bell, Comm. p. 467, 468, 5th edit.; 1 Bell, Comm. § 399, 4th edit.; Lovett *v.* Hobbs, 2 Shower, R. 128; Clarke *v.* Gray, 4 Esp. R. 177; s. c. 6 East, R. 564; Dwight *v.* Brewster, 1 Pick. R. 50;

teamsters, carmen, and porters, who undertake to carry goods for hire, as a common employment, from one town to another,[1] or from one part of a town or city to another.[2] Of the latter description are the owners and masters of ships, whether they are regular packet-ships, or carrying-smacks, or coasting-ships, or other ships carrying on general freight.[3] [This is to be understood of owners who have the control, employment, and management of the vessel; for the mere owner is not liable as a carrier merely by virtue of his ownership, the criterion being employment, not ownership.[4] So are the owners and masters of steamboats engaged in the transportation of goods for persons generally for hire.[5] So are lightermen, hoymen, barge-owners, ferrymen,[6] canal-boatmen, and others employed in the like manner.[7] The owners of a steamboat who undertake to

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Camden and Amboy Railroad Company *v.* Burke, 13 Wend. R. 611; Beckman *v.* Shouse, 5 Rawle, R. 179; Palmer *v.* Grand Junction Railway Company, 4 Mees. & Welsb. R. 749; Powell *v.* Myers, 26 Wend. R. 591.

[1] Gisbourne *v.* Hurst, 1 Salk. R. 249; Gordon *v.* Hutchinson, 1 Watts & Serg. R. 285. In this last case it was held that a wagoner who carries goods for hire thereby contracts the responsibility of a common carrier, whether transportation be his principal and direct business, or an occasional and incidental employment.

[2] 2 Kent, Comm. Lect. 40, p. 598, 599, 4th edit.; Robertson *v.* Kennedy, 2 Dana, R. 431.

[3] 1 Bell, Comm. p. 467, 5th edit.; 1 Bell, Comm. § 399, 4th edit.

[4] Tuckerman *v.* Brown, 17 Barbour, R. 191. See Peters *v.* Rylands, 8 Harris, Penn. R. 497.

[5] 2 Kent, Comm. Lect. 40, p. 598, 599, 608, 4th edit.; Jones on Carriers, 1; Bennett *v.* Filyaw, 1 Florida, R. 403; Abbott on Shipp. Pt. 2, ch. 2, § 2, 3, 4; Jencks *v.* Coleman, 2 Sumner, R. 221; Orange County Bank *v.* Brown, 9 Wend. R. 85; Crosby *v.* Fitch, 12 Conn. R. 410; Camden and Amboy Railroad Co. *v.* Burke, 13 Wend. R. 611, 627, 628; Hastings *v.* Pepper, 11 Pick. R. 41; Allen *v.* Sewall, 2 Wend. R. 327; s. c. 6 Wend. R. 335; Harrington *v.* McShane, 2 Watts, R. 443; Saltus *v.* Everett, 20 Wend. R. 267; Hall *v.* Connecticut River Steamboat Co. 13 Connect. R. 319.

[6] See Willoughby *v.* Horridge, 16 Eng. Law and Eq. R. 437; 12 C. B. 742; White *v.* Winnisimmet Co. 7 Cushing, R. 156; Smith *v.* Seward, 3 Barr, Penn. R. 342; Peixotti *v.* McLaughlin, 1 Strobhart, 468; Wilsons *v.* Hamilton, 4 Ohio St. R. 722; Pomeroy *v.* Donaldson, 5 Miss. 36; Babcock *v.* Herbert, 3 Ala. 392; Sanders *v.* Young, 1 Head (Tenn.), 219.

[7] Jones on Bailm. 106, 107, 108; 2 Kent, Comm. Lect. 40, p. 598, 599, 600,

tow freight-boats for hire, or undertake to tow vessels in or out of port for hire, are not common carriers; but are responsible only for ordinary skill, care, and diligence in their undertaking.[1] [But if they contract to tow a boat "at the risk of the masters and owners" thereof, they are still liable for gross negligence.[2] And it has been thought that expressmen, i. e. persons who

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4th edit.; Bac. Abridg. *Carriers*, A.; Morse *v.* Slue, 1 Mod. R. 85; s. c. 1 Vent. R. 190, 238; s. c. T. Raym. R. 220; s. c. 2 Lev. R. 69; Rich *v.* Kneeland, Cro. Jac. 330; Lyon *v.* Mells, 5 East, R. 439; DeMott *v.* Laraway, 14 Wend. R. 225; Allen *v.* Sewall, 2 Wend. R. 327, 340; s. c. 6 Wend. R. 325; Smith *v.* Seward, 3 Barr, Penn. R. 342; 1 Bell, Comm. p. 467, 5th edit.; 1 Bell, Comm. § 399, 4th edit.; 1 Roll. Abridg. *Action sur Case*, C., Pl. 2. In Brind *v.* Dale, 8 Carr. & Payne, 207; s. c. 2 Mood. & Rob. R. 80, Lord Abinger seems to have held, that a town carman, whose carts ply for hire near the wharves, and who also lets the same out by the hour, or day, or job, is not a common carrier. It is very difficult to distinguish between the case of a carman and that of a hoyman, or lighterman, or barge-man, plying between different parts of the same town, or taking jobs by the hour or the day. And yet it does not seem to have been doubted, that such hoymen, lightermen, and bargemen are common carriers. See Lyon *v.* Mells, 5 East, R. 439. What substantial distinction is there in the case of parties, who ply for hire in the carriage of goods for all persons indifferently, whether the goods are carried from one town to another, or from one place to another within the same town? [That there is no such distinction, see Robertson *v.* Kennedy, 2 Dana, 430; Ingate *v.* Christie, 3 C. & K. 61; Hellaby, *v.* Weaver, 17 Law Times Rep. July 8, 1851.] Is there any substantial difference, whether the parties have fixed *termini* of their business or not, if they hold themselves out as ready and willing to carry goods for any persons whatsoever, to or from any places in the same town or in different towns? Is a ship, engaged in general freighting business, or let out generally for hire for any voyage which the freighter may require, less a common carrier than a regular packet-ship, which plies between different ports? See Rich *v.* Kneeland, Cro. Jac. 330; 1 Roll. Abridg. *Action sur Case*, C., Pl. 1–4; Wardell *v.* Mourillyan, 2 Esp. R. 693; 1 Bell, Comm. p. 467, 468, 5th edit.; Whalley *v.* Wray, 3 Esp. R. 74; Harrington *v.* Lyles, 2 Nott & McCord, R. 88; Cohen *v.* Hume, 1 McCord, R. 444; Pardee *v.* Drew, 25 Wend. R. 459; Parsons *v.* Hardy, 14 Wend. R. 215; De Mott *v.* Laraway, 14 Wend. R. 225; Muddle *v.* Stride, 9 Carr. & Payne, R. 380; Gordon *v.* Hutchinson, 1 Watts & Serg. 285.

[1] Caton *v.* Rumney, 13 Wend. R. 387; Wells *v.* The Steam Navigation Co. 2 Comstock, R. 204. See 2 Kent, Comm. Lect. 40, p. 598, 599, 4th edit.; Leonard *v.* Hendrickson, 6 Harris, Penn. R. 40; Alexander *v.* Greene, 3 Hill, R. 9; s. c. 7 Hill, R. 533. But see Sproul *v.* Hemmingway, 14 Pick. R. 1; Smith *v.* Pierce, 1 Louis. R. 349; Adams *v.* N. O. Steam Tow-boat, Co. 11 Louis. R. 46.

[2] Wells *v.* Steam Navig. Co. 4 Selden, R. 375; Alexander *v.* Greene, 7 Hill, 544.

forward goods from place to place for hire, but in conveyances owned and managed by others, are not common carriers, although they carry for everybody who may employ them,[1] but the better opinion is otherwise.[2]]

§ 497. The rule in respect to carriers by water, established in England, seems to be generally understood to be the rule in America. It has been recognized in an ample manner in several of the States.[3] In one case, indeed, in New York, it was adjudged, that the owners of a vessel bringing goods from New-Orleans to New York for hire were not to be deemed common carriers.[4] But this decision is in direct repugnance to prior, as well as to subsequent, decisions made on the same point in the same State; and the general rule of the common law is now fully established there.[5] An effort also has been made in Pennsylvania to relax the general rigor of the rule, and to take a distinction between carriers on inland waters and carriers on land; but it does not seem as yet to be settled in that State.[6] In respect to carriers on land, the rule of the common law seems everywhere admitted in its full rigor,[7] in

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[1] Hersfield *v.* Adams, 19 Barbour, R. 577.

[2] Read *v.* Spaulding, 5 Bosworth, 395; Baldwin *v.* American Express Co. 23 Ill. 198; Haslam *v.* Adams Express Co. 6 Bosw. 235; Newstadt *v.* Adams, 5 Duer, 43; Richards *v.* Westcott, 2 Bosw. 589.

[3] Richards *v.* Gilbert, 5 Day, R. 415; Boyce *v.* Anderson, 2 Peters, R. 150, 155; 2 Kent, Comm. Lect. 40, p. 600, 608, 609, 4th edit.; Clark *v.* Richards, 1 Connect. R. 54; Williams *v.* Grant, 1 Connect. R. 487; Bell *v.* Reed, 4 Binn. R. 127; Brown *v.* Clayton, 12 Geo. R. 564; Emery *v.* Hersey, 4 Greenl. R. 407; McClures *v.* Hammond, 1 Bay, R. 99, 101; Harrington *v.* Lyles, 2 Nott & McCord, R. 88; Hastings *v.* Pepper, 11 Pick. R. 41; Dwight *v.* Brewster, 1 Pick. R. 50; De Mott *v.* Laraway, 14 Wend. R. 225.

[4] Aymar *v.* Astor, 6 Cowen, R. 266; Crosby *v.* Fitch, 12 Conn. R. 410.

[5] 2 Kent, Comm. Lect. 40, p. 600, 608, 609, and note (b); Elliott *v.* Rossell, 10 Johns. R. 1; Kemp *v.* Coughtry, 11 Johns. R. 107; Allen *v.* Sewall, 2 Wend. R. 327; s. c. 6 Wend. R. 335.

[6] Gordon *v.* Little, 8 Serg. & Rawle, 533; Bell *v.* Reed, 4 Binn. R. 127; Hand *v.* Baynes, 4 Whart. R. 204; Beckman *v.* Shouse, 5 Rawle, R. 179; Post, § 499.

[7] 2 Kent, Comm. Lect. 40, p. 599, 600, 608, 609, 4th edit.; Gordon *v.* Little, 8 Serg. & Rawle, 533; Dwight *v.* Brewster, 1 Pick. R. 50; Hastings *v.* Pepper, 11 Pick. R. 41; Hand *v.* Baynes, 4 Whart. R. 204; Beckman *v.* Shouse, 5 Rawle, R. 179.

the States governed by the jurisprudence of the common law. Louisiana in general has followed the doctrine of the Roman and French law in her own code.[1]

§ 498. But the proprietors of stage-coaches, whose employment is solely to carry passengers (such as hackney-coachmen), are not deemed common carriers.[2] Although as to the luggage or baggage of the passengers they may incur the same liability as common carriers.[3] They are not responsible for mere accidents happening to the persons of passengers, without any default whatsoever on their part. On the other hand, they are responsible for the exercise of the highest degree of care and diligence, or, as it has been expressed, for all diligence in the carriage of passengers, as far as human care and foresight will go.[4] If (as is ordinarily the case) they are also accustomed to carry the baggage of passengers, although they receive no specific compensation therefor, but simply receive their fare for the passage of the travellers; yet, like common carriers, they are responsible for the safety of such baggage, and for proper care thereof; since it constitutes a part of the service for which the fare is paid, and the passengers are thereby induced to travel in the coach, and the custody of the baggage may be properly deemed, as in the case of an innkeeper, an accessory to the principal contract.[5] Upon the responsibility of the pro-

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[1] Code of Louisiana of 1825, art. 2722 to 2728.

[2] Bac. Abridg. *Carriers*, A.; 2 Kent, Comm. Lect. 40, p. 600 to 602, 4th edit.; 1 Bell, Comm. p. 467, 468, 475, 5th edit.; 4 Bell, Comm. § 400, 4th edit.; Aston *v.* Heaven, 2 Esp. R. 533; White *v.* Boulton, Peake, R. 81; Christie *v.* Griggs, 2 Camp. R. 79; Post, § 499, 590.

[3] See Post, § 555; Hollister *v.* Nowlen, 19 Wend. R. 234; Cole *v.* Goodwin, 19 Wend. R. 251; Powell *v.* Myers, 26 Wend. R. 591, 594, 596; Camden and Amboy Railroad and Transportation Co. *v.* Belknap, 21 Wend. R. 354; Pardee *v.* Drew, 25 Wend. R. 459; Bomar *v.* Maxwell, 9 Humphreys, R. 621.

[4] Post, § 601; Stokes *v.* Saltonstall, 13 Peters, R. 181; Hall *v.* Connecticut River Steamboat Co. 13 Connect. R. 319; Camden and Amboy Railroad Co. *v.* Burke, 13 Wend. R. 615, 627, 628; Aston *v.* Heaven, 2 Esp. R. 533; Christie *v.* Griggs, 2 Camp. R. 79; Dudley *v.* Smith, 1 Camp. R. 167; White *v.* Boulton, Peake, R. 81; Robinson *v.* Dunmore, 2 Bos. & Pul. R. 417; 2 Kent, Comm. Lect. 40, p. 600, 601, 4th edit.; Sharp *v.* Grey, 9 Bing. R. 457.

[5] Lord Holt, in Lane *v.* Cotton, 12 Mod. R. 487; Ante, § 470; Jones on Bailm. 94; Dig. Lib. 4, tit. 9, l. 5; 2 Kent, Comm. Lect. 40, p. 600, 601, 4th

prietors of stage-coaches, rail-cars, and steamboats, and other carriers of passengers, we shall have occasion hereafter to treat more at large.[1]

§ 499. It has been a matter of some controversy, in what character the proprietors of stage-coaches, and steamboats, and rail-cars, are to be regarded.[2] In regard to the persons of passengers, it is now clear (as we shall presently see),[3] that they are not to be deemed common carriers, so as to be liable for all injuries and damages, from which, as common carriers, they would not be excused. The more important question has been in regard to their liability for the baggage of passengers; whether it is that of common carriers, or only that of private persons engaging ordinarily for hire; that is, for due and reasonable skill and diligence in their undertaking.[4] The general tendency of the authorities, however, has at all times been to the point, that, as to the baggage of the passengers, the proprietors are common carriers. [And if the baggage is retained by the passenger under his exclusive possession and custody, the carrier is not liable.[5]] And the doctrine seems now firmly established, both in England and America, that the responsibility of coach proprietors, carrying passengers, with their baggage, stands, as to their baggage, upon the ordinary

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edit.; Middleton *v.* Fowler, 1 Salk. R. 282; Upshare *v.* Aidee, 1 Comyns, R. 25; Post, § 554; Wolf *v.* Summers, 2 Camp. R. 631; Powell *v.* Myers, 26 Wend. R. 591; Camden and Amboy Railroad and Transportation Co. *v.* Belknap, 21 Wend. R. 354; Pardee *v.* Drew, 25 Wend. R. 459; Hollister *v.* Nowlen, 19 Wend. R. 234; Bomar *v.* Maxwell, 9 Humphreys, R. 621; Hawkins *v.* Hoffman, 6 Hill, R. 586; Blanchard *v.* Isaacs, 3 Barbour, Supreme Court (N. Y.), R. 388. But see Selw. N. P. 323, note (d); Orange County Bank *v.* Brown, 9 Wend. R. 85.

[1] Post, § 590 to 604.

[2] Ante, § 496.

[3] Post, § 590 to 604; 2 Kent, Comm. Lect. 40, p. 600, 601, 4th edit.

[4] Selw. N. P. 4th edit. p. 333, and note; Clarke *v.* Gray, 4 Esp. R. 177; Robinson *v.* Dunmore, 2 Bos. & Pul. R., per Chambre, J.; 2 Kent, Comm. Lect. 40, p. 600 to 602, 4th edit.; 5 Petersd. Abridg. *Carriers*, 59, note; Jeremy on Carriers, 12.

[5] Cohen *v.* Frost, 2 Duer (N. Y.), R. 335; Hawkins *v.* Hoffman, 6 Hill, R. 586.

footing of common carriers.[1] Mr. Bell has deduced this as the true modern doctrine on the subject.[2] But by baggage we are to understand such articles of necessity or personal convenience as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purposes, such as a sale and the like.[3] [But

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[1] Ibid.; Post, § 590; Brooke *v.* Pickwick, 4 Bing. 218, 222; Christie *v.* Griggs, 2 Camp. R. 80; Allen *v.* Sewall, 2 Wend. R. 327, 341; s. c. 6 Wend. R. 335; Clarke *v.* Gray, 6 East, R. 564; Camden and Amboy Railroad Co. *v.* Burke, 13 Wend. R. 611, 627, 628; Orange Co. Bank *v.* Brown, 9 Wend. R. 85, 114 to 119; Hollister *v.* Nowlen, 19 Wend. R. 234; Cole *v.* Goodwin, 19 Wend. R. 251; Camden and Amboy Railroad Co. *v.* Belknap, 21 Wend. R. 354; Powell *v.* Myers, 26 Wend. R. 591; 2 Kent, Comm. Lect. 40, p. 600, 601, 4th edit.; Pardee *v.* Drew, 25 Wend. R. 459. But see Beckman *v.* Shouse, 5 Rawle, R. 179; Ante, § 497.

[2] 1 Bell, Comm. p. 467, 468, 475, 5th edit.; 1 Bell, Comm. § 400, 4th edit.

[3] Pardee *v.* Drew, 25 Wend. R. 459; Parmela *v.* Fischer, 22 Ill. R. 212; Hawkins *v.* Hoffman, 6 Hill, R. 586. [In Dibble *v.* Brown, 12 Geo. 217, Nisbett, J., said: "It remains, however, to inquire, what is to be understood by baggage, for which they are thus liable? And we are not guided, in this inquiry by adjudications which settle a definite rule of universal application. From their usual course of business, when they carry a passenger, a contract is implied to carry also his baggage. They are presumed to be compensated in the fare for his transportation, and I can very well believe, well compensated, because the amount of travel is greatly increased by the comfort and convenience of carrying baggage, and would be lessened, if, for his baggage, a passenger was required to pay freight. It is curious to remark, as I do, *en passant*, that the law takes more care of a man's luggage, than it does of his life and limbs; for the former, the carrier is liable as insurer against loss, except by the act of God and the public enemies; for the safety of the latter, he is bound only to extraordinary care and diligence. But to return: to what articles, under the denomination of baggage, does this implied contract extend?

"Judge Story informs us that 'by baggage, we are to understand such articles of necessity or personal convenience as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purposes, such as a sale and the like.' Story on Bail. § 499. In Orange County Bank *v.* Brown, Judge Nelson says: 'A reasonable amount of baggage, by custom or the courtesy of the carrier, is considered as included in the fare for the person; but Courts ought not to permit this gratuity or custom to be abused, and under pretence of baggage, to include articles not within the sense or meaning of the term, or within the object or intent of the indulgence of the

it has been said that although passenger carriers are not liable for merchandise when packed up with a traveller's baggage, if

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carrier, and thereby defraud him of his just compensation, and subject him to unknown and illimitable hazards.' 9 Wend. 115, 116. In Hawkins *v.* Hoffman, Bronson, J., says: 'An agreement to carry ordinary baggage may well be implied from the usual course of business; but the implication cannot be extended a single step beyond such things as the traveller usually has with him as part of his luggage. It is doubtless difficult to define, with accuracy, what shall be deemed baggage, within the rule of the carrier's liability. I do not intend to say, that the articles must be such as every man deems essential to his comfort; for some men may carry nothing, or very little with them, when they travel, whilst others consult their convenience by carrying many things. Nor do I mean to say that the rule is confined to wearing apparel, brushes, razors, writing apparatus, and the like, which most persons deem indispensable. If one has books for his instruction or amusement, by the way, or carries his gun or fishing-tackle, they would undoubtedly fall within the term baggage, because they are usually carried as such. This is, I think, a good test for determining what things fall within the rule.' 6 Hill's N. Y. R. 589, 590.

"It has been decided that, under the term baggage, merchandise, as silks or other fine articles are not embraced (25 Wend. 458); nor large sums of money (9 Wend. 85); nor samples of merchandise (6 Hill's N. Y. R. 586). A watch is embraced, according to the Ohio Courts. 10 Ohio R. 145. So far as these rulings go, the doctrine may be considered as settled, and it must be considered as settled in all cases falling within the reason of those rulings. When, however, all this is done, the subject is disencumbered of but little of the difficulty which environs it. Nor does the text of Story, or the opinions of Judges Nelson and Bronson relieve it of embarrassment. When we settle down with Judge Story upon the proposition that, by *baggage*, is to be understood 'such articles of necessity or personal convenience as are usually carried by passengers, for their personal use,' we are still without a rule for determining what articles are included in baggage. For such things as would be necessary to one man would not be necessary to another; articles which would be held but ordinary conveniences by A, might be considered incumbrances by B. One man, from choice, or habit, or from educational incapacity to appreciate the comforts or conveniences of life, needs perhaps a *port manteau*, a change of linen, and an indifferent razor; whilst another, from habit, position, and education, is unhappy without all the appliances of comfort which surround him at home. The quantity and character of baggage must depend very much upon the condition in life of the traveller — his calling, his habits, his tastes, the length or shortness of his journey, and whether he travels alone, or with a family. If we agree further with Judge Story, and say that the articles of necessity or of convenience must be such as are *usually* carried by travellers for their personal use, we are still at fault, because there is no State of this Union, nor in any part of any one State, any settled usage, as to the baggage which travellers carry

the baggage be lost, yet if the merchandise be so packed as to be obviously merchandise to the eye, and the carrier takes it without objection, he is liable for the loss.[1] The term baggage has been thought to include personal jewelry;[2] a watch in a trunk, valued at $94;[3] a set of carpenters' tools, to a reasonable amount;[4] a pair of pistols;[5] money in a trunk to a

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with them for their personal use. The quantity and character of baggage found to accompany passengers, are as various as are the countenances of the travellers.

"The negative part of Judge Story's definition, with more precision, furnishes a rule *pro tanto*. Baggage, he says, does not embrace merchandise, or other valuables not designed for personal use, but which are designed for other purposes, such as a sale or the like. We may safely say, that it does not embrace merchandise or other articles which are intended to be sold. But it is not to be understood, I apprehend, that no article is embraced which may be classed with merchandise, or which is a valuable, other than such as is usual for personal use. Regard must be had to the quantity and value of the articles. A trunk of laces, for instance, although light and small in bulk, clearly is excluded. Their value would exclude them. The risk imposed upon the carrier, is not that contemplated in the implied contract to carry *baggage*, and to be responsible for it. The liability in such a case, would be wholly disproportioned to the compensation which he is presumed to derive from the fare of passengers. Besides, it is a fraud upon him to subject him to so great a hazard, without warning him of its existence."]

[1] The Great Northern Railway Co. *v.* Shepherd, 9 Eng. Law and Eq. R. 477. And see s. c. 14 Eng. Law and Eq. R. 369; s. c. 8 Exch. R. 30.

[2] McGill *v.* Rowand, 3 Barr, (Penn.) 451. And see Brooke *v.* Pickwick, 4 Bing. R. 218. See Nevins *v.* Bay State Steamboat Co., 4 Bosw. 226.

[3] Jones *v.* Voorhees, 10 Ohio, R. 145. But see Bomar *v.* Maxwell, 9 Humph. R. 621.

[4] Porter *v.* Hildebrand, 2 Harris (Penn.), R. 129.

[5] [Woods *v.* Devin, 13 Ill. R. 746; Davis *v.* Southern Michigan R. 22 Ill. R. 281. Treat, C. J., said: "In the present case, the defendant was a common carrier of passengers. The plaintiff engaged a passage to La Salle, and sent his baggage to the boat. The moment it was received on board the defendant became responsible for its safe delivery at the port of destination, loss occasioned by inevitable accident or the public enemies only excepted. The carpet-bag was stolen from the boat and never recovered by the plaintiff. Loss by theft is not within either of the exceptions to the risk of a common carrier. The defendant is therefore chargeable with the value of the articles in the carpet-bag, unless they are not to be regarded as forming a part of the baggage of a traveller. It is conceded that the articles of wearing apparel were properly baggage; and the only question is in respect to the pistols. What con-

reasonable amount, *bonâ fide* intended for travelling expenses

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stitutes the baggage of a traveller, for the loss of which a common carrier is liable, is a question of some practical importance, and one that has been much considered in reported cases. It is agreed in all the cases that the term *baggage* includes the wearing apparel of the traveller. In the Orange County Bank *v.* Brown, *supra*, the trunk of a passenger containing $11,250 in money belonging to the bank was lost; and the bank sought to recover the amount of the carrier, on the ground that it was part of the baggage of the passenger. But the Court decided that the money did not fall within the term baggage; and that the attempt to carry it free of reward under cover of baggage was an imposition on the carrier. In Pardee *v.* Drew, 25 Wend. 457, where a trunk containing valuable merchandise, and nothing else, was taken on board of a boat by a passenger, and deposited with the ordinary baggage, it was held that the carrier was not chargeable for its loss. In Hawkins *v.* Hoffman, *supra*, it was decided that the term 'baggage' did not embrace samples of merchandise carried by a passenger in his trunk for the purpose of enabling him to make bargains for the sale of goods. In Cole *v.* Goodwin, 19 Wend. 251, and Weed *v.* The Saratoga and Schenectady Railroad Company, Id. 534, the Court held that a carrier was liable for money in the trunk of a passenger not exceeding a reasonable amount for travelling expenses. In Jones *v.* Voorhees, 10 Ohio, 145, a carrier was made liable for the value of a gold watch lost from the trunk of a passenger. In McGill *v.* Rowand, 3 Barr, 451, the husband was permitted to recover of the carrier the value of his wife's jewelry which had been taken from her trunk on the coach in which she was a passenger. In Porter *v.* Hildebrand, 2 Har. 129, the Court held that a carpenter might recover from a carrier the value of tools contained with clothing in his trunk, which the carrier had lost, the Jury having found that they were the reasonable tools of a carpenter.

"The principle of the authorities is, that the term 'baggage' includes a reasonable amount of money in the trunk of a passenger, intended for travelling expenses, and such articles of necessity and convenience as are usually carried by passengers for their personal use, comfort, instruction, amusement, or protection; and that it does not extend to money, merchandise, or other valuables, although carried in the trunks of passengers, which are designed for different purposes. And regard may with propriety be had to the object and length of the journey, the expenses attending it, and the habits and condition in life of the passenger. A more definite rule cannot be well laid down. The remarks of Bronson, J., in Hawkins *v.* Hoffman, *supra*, are pertinent. He says: "It is undoubtedly difficult to define with accuracy what shall be deemed baggage within the rule of the carrier's liability. I do not intend to say that the articles must be such as every man deems essential to his comfort; for some men carry nothing or very little with them when they travel, while others consult their convenience by carrying many things. Nor do I intend to say that the rule is confined to wearing apparel, brushes, razors, writing apparatus, and the like, which most persons deem indispensable. If one has books for instruction or his

and personal use ;[1] although on this point the decisions are not uniform.[2] But not large sums of money, such as are carried merely for transportation, and not for convenience on the way.[3] Nor articles of merchandise not intended for personal use; such as "thirty-eight pairs of new shoes, sixty pairs of stock for boys' shoes, and two papers of shoe nails."[4] Nor for a box of jewelry, carried as and for merchandise.[5]]

[§ 499 *a*. The authorities are not entirely harmonious upon the question how far, if at all, the plaintiff is a competent witness, at common law, to testify to the contents of a trunk or other package lost, or destroyed by a carrier. In one case he was admitted, where the captain of a vessel had broken open and plundered a trunk, intrusted to him;[6] but this probably was on the ground of the special circumstances of the case, and *in odium spoliatoris*. But many cases have gone further, permitting the plaintiff, and in some instances his wife, to testify as to the contents and *value* of the articles in a trunk lost by the carrier, and where there was no imputation of fraud, or violence, but simply of negligence;[7] and this on the ground of necessity; the rule even in these cases being confined, how-

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amusement by the way, or carries his gun or fishing-tackle, they would undoubtedly fall within the term 'baggage,' because they are usually carried as such.'"]

[1] [Jordan *v.* The Fall River Railroad Co. 5 Cush. R. 70; Illinois Central Railroad *v.* Copeland, 24 Illinois, 332. The sum of $439 was thought to be an unreasonable sum in Davis *v.* Michigan, &c. Railroad, 22 Ill. R. 278.]

[2] See Grant *v.* Newton, 1 E. D. Smith, 95, where the contrary is held. And see Bomar *v.* Maxwell, 9 Humphreys, R. 621.

[3] Orange County Bank *v.* Brown, 9 Wendell, 85.

[4] Collins *v.* Boston & Maine Railroad, 10 Cush. 506.

[5] Richards *v.* Westcott, 2 Bosw. 589.

[6] Herman *v.* Drinkwater, 1 Greenl. R. 27. And see Oppenheimer *v.* Edney, 9 Humphreys, R. 385. And the same rule applies to robbery by an innkeeper of a trunk of his guest. Sparr *v.* Wellman, 11 Missouri, R. 230. And see Sneider *v.* Geiss, 1 Yeates, R. 34.

[7] [Mad River Railroad Co. *v.* Fulton, 20 Ohio, R. 318; McGill *v.* Rowand, 3 Barr (Penn.), R. 451; Clark *v.* Spence, 10 Watts, R. 335; Johnson *v.* Stone, 11 Humphreys, R. 419; Whitesell *v.* Crane, 8 Watts & Serg. R. 369; Gilmore *v.* Bowden, 3 Fairf. R. 412. Some cases require an absolute necessity to exist before such testimony is competent. Dibble *v.* Brown, 12 Georgia, 217.]

ever, to articles necessary and convenient for travelling;[1] and in one case it was held not to extend to money;[2] although there are contradictory decisions on this point.[3] On the other hand, in Massachusetts and South Carolina, the plaintiff is excluded altogether, in such cases.[4] And in some courts he is

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[1] Bingham *v.* Rogers, 6 Watts & Serg. R. 495; Pudor *v.* Boston and Maine Railroad Co. 26 Maine R. 458.

[2] David *v.* Moore, 2 Watts & Serg. R. 230.

[3] Johnson *v.* Stone, 11 Humphreys, R. 419; Ill. Central Railroad *v.* Copeland, 24 Ill. R. 333.

[4] [Snow *v.* Eastern Railroad Co. 12 Metc. R. 44; Dill *v.* The S. C. Railroad Co. 7 Richard. R. 153. In the first case, Hubbard, J., is reported to have said: "The law of evidence is not of a fleeting character; and though new cases are occurring calling for its application, yet the law itself rests on the foundation of the ancient common law, one of the fundamental rules of which is, that no person shall be a witness in his own case. This rule has existed for ages, with very little modification, and has yielded only where, from the nature of the case, other evidence was not to be obtained, and there would be a failure of justice without the oath of the party. These are exceptions to the rule, and form a rule of themselves. In some cases, the admission of the party's oath is in aid of the trial, and in others it bears directly on the subject in controversy. Thus the oath of the party is admitted in respect to a lost deed, or other paper, preparatory to the offering of secondary evidence to prove its contents; and also for the purpose of procuring a continuance of a suit, in order to obtain testimony; and for other reasons. So the oath of a party is admitted to prove the truth of entries, in his book, of goods delivered in small amounts, or of daily labor performed, when the parties, from their situation, have no evidence but their accounts, and, from the nature of the traffic or service, cannot have, as a general thing. So, in complaints under the bastardy act, where the offence is secret, but yet there is full proof of the fact, the oath of the woman is admitted to charge the individual. In cases also where robberies or larcenies have been committed, and where no other evidence exists but that of the party robbed or plundered, he has been admitted as a witness to prove his loss; as it is said the law so abhors the act, that the party injured shall have an extraordinary remedy, *in odium spoliatoris*. Upon this principle, in an action against the hundred, under the statute of Winton, the person robbed was admitted as a witness to prove his loss, and the amount of it. Bul. N. P. 187; Esp. on Penal Sts. 211; 1 Phil. Ev. c. 5, § 2; 2 Stark. Ev. 681; Porter *v.* Hundred of Regland, Peake's Add. Cas. 203. So in equity, where a man ran away with a casket of jewels, the party injured was admitted as a witness. East India Co. *v.* Evans, 1 Vern. 308. A case has also been decided in Maine (Herman *v.* Drinkwater, 1 Greenl. 27), where the plaintiff was admitted to testify. In that case a shipmaster received

admitted to testify to the contents of his trunk, but not to their value.[1]]

§ 500. If the proprietors of a stage-coach for passengers carry goods also for hire, they are in respect to such goods to be deemed common carriers, and responsible accordingly.[2] But in all such cases, it must be clear that the proprietors hold themselves out as persons exercising a public employment, and as being ready to carry goods for hire for persons in general. The mere fact that the drivers of their coaches are accustomed to carry packages of money or other things for

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a trunk of goods in London, belonging to the plaintiff, to be carried in his ship to New York, and on board which the plaintiff had engaged his passage. The master sailed, designedly leaving the plaintiff, and proceeded to Portland, instead of New York. He there broke open and plundered the trunk. These facts were found *aliunde*, and the plaintiff was allowed to testify as to the contents of the trunk. These cases proceed upon the criminal character of the act, and are limited in their nature. The present case does not fall within the principle. Here was no robbery, no tortious taking away by the defendants, no fraud committed. It is simply a case of negligence on the part of carriers. The case is not brought within any exception to the common rule, and is a case of defective proof on the part of the plaintiff, not arising from necessity but from want of caution. To admit the plaintiff's oath, in cases of this nature, would lead, we think, to much greater mischiefs, in the temptation to frauds and perjuries, than can arise from excluding it. If the party about to travel, places valuable articles in his trunk, he should put them under the special charge of the carrier, with a statement of what they are, and of their value, or provide other evidence, beforehand, of the articles taken by him. If he omits to do this, he then takes the chance of loss, as to the value of the articles, and is guilty, in a degree, of negligence — the very thing with which he attempts to charge the carrier. Occasional evils only have occurred, from such losses, through failure of proof; the relation of carriers to the party being such that the losses are usually adjusted by compromise. And there is nothing to lead us to innovate on the existing rules of evidence. No new case is presented; no facts which have not repeatedly occurred; no new combination of circumstances.]

[1] Parmeller *v.* McNulty, 19 Ill. R. 558; Davis *v.* Michigan Railroad, 22 Ill. 278; Illinois Central Railroad *v.* Taylor, 24 Ill. R. 323; Same *v.* Copeland, Id. 332.

[2] Bac. Abridg. *Carriers*, A.; Lovett *v.* Hobbs, 2 Shower, R. 128; Middleton *v.* Fowler, 1 Salk. R. 282; Upshare *v.* Aidee, 1 Comyns, R. 25; Dwight *v.* Brewster, 1 Pick. R. 50; Allen *v.* Sewall, 2 Wend. R. 327, 341; s. c. 6 Wend. R. 335; Orange County Bank *v.* Brown, 9 Wend. R. 85, 114 to 119; Hastings *v.* Pepper, 11 Pick. R. 41; Camden and Amboy Railroad Co. *v.* Burke, 13 Wend. R. 611, 627, 628; 2 Kent, Comm. Lect. 40, p. 598, 599, 600, 4th edit.

hire, for their own personal emolument, will not make the proprietors responsible therefor, as common carriers.[1] Neither will the drivers themselves, in such cases, be personally liable as common carriers, if this is not their common employment, or if they do not hold themselves out to the public to carry generally for hire; but they will be deemed mere ordinary bailees for hire.[2] The like reasoning applies to packet-ships, and steamboats, and rail-cars, which ply between different ports or places, and are accustomed to carry merchandise, as well as passengers.[3]

§ 501. When it is said that the owners and masters of ships are deemed common carriers, it is to be understood of such ships as are employed as general ships, or for the transportation of merchandise for persons in general; such as vessels employed in the coasting trade, or in foreign trade, or on general freighting business for all persons offering goods on freight for the port of destination.[4] In such cases, it will make no difference, whether in fact the whole cargo belongs to one shipper, or to many shippers, so always that the ship retains her character and employment, as a general ship, or common carrier. But if the owner of a ship employs it on his own account generally, or if he lets the tonnage with a small exception to a single person, and then, for the accommodation of a particular individual, he takes goods on board for freight (not receiving them for persons in general), he will not be deemed a common carrier, but a mere private carrier; for he does not, under such circumstances, hold himself out

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[1] Middleton *v.* Fowler, 1 Salk. R. 282; Bean *v.* Sturtevant, 8 New Hamp. R. 146. But if the coach owners employ a driver under contract that he shall receive a certain sum of money per month, and the compensation which shall be paid for carrying small packages, that will make the carriers personally liable for the loss of goods by the driver, which he is intrusted to carry, unless the proprietor of the goods knows the arrangement, and contracts with the driver solely as principal. Ibid. See Hosea *v.* McCrory, 12 Ala. R. 349.

[2] Shelden *v.* Robinson, 7 New Hamp. R. 157; Post, § 507.

[3] Shelden *v.* Robinson, 7 New Hamp. R. 157; Parker *v.* Great Western Railway Co. 7 Manning & Granger, R. 253; Thomas *v.* Boston and Providence Railroad Co. 10 Metc. R. 472.

[4] Abbott on Shipp. P. 3, ch. 2, § 1, 2, 5th edit.

as engaged in a public business or employment.[1] If the whole ship is chartered by the owner to a single person for a particular voyage out and home, for a specified freight, under a charter-party, that charter-party will, of course, be held to regulate the rights, duties, and responsibilities of the parties, and may supersede, *pro hac vice*, the general rights, duties, and responsibilities of the ship-owner, as a common carrier.[2]

§ 502. A person who receives and forwards goods (commonly called a forwarding merchant), who takes upon himself the expenses of transportation, for which he receives a compensation, from the owners, but who has no concern in the vessels or wagons by which they are transported, and no interest in the freight, is not deemed a common carrier; but he is a mere warehouseman and agent.[3]

§ 503. We have already had occasion to notice, that, notwithstanding wharfingers are sometimes asserted to be liable as common carriers, yet that, properly speaking, there is at present no sufficient authority on which to rest that doctrine.[4]

§ 504. It seems to have been held, in one case, that a person who undertakes to carry goods by water is liable as a common carrier, notwithstanding the declaration does not allege him to be a common carrier, but is founded upon a special contract.[5] That case was in fact against a common hoyman for the negligent loss of goods; and the Court was of opinion, that, as he was a common hoyman, evidence to show that he

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[1] See, however, Walter *v.* Brewer, 11 Mass. R. 99; King *v.* Lenox, 19 Johns. R. 235; Reynolds *v.* Toppan, 15 Mass. R. 370; Allen *v.* Sewall, 2 Wend. R. 327, 342; Boucher *v.* Lawson, Cas. T. Hard. 194. See Shackleford *v.* Wilcox, 9 Louis. R. 33, 84.

[2] And see Tuckerman *v.* Brown, 17 Barbour, R. 191; Peters *v.* Rylands, 8 Harris (Penn.), R. 497. See Campbell *v.* Perkins, 4 Selden, R. 430.

[3] Roberts *v.* Turner, 12 Johns. R. 232; Platt *v.* Hibbard, 7 Cowen, R. 497; 2 Kent, Comm. Lect. 40, p. 591, 4th edit.; Ante, § 444 to 450, 457, 495; Maybin *v.* South Carolina R. R. Co. 8 Rich. R. 240. But see Teall *v.* Sears, 9 Barbour, R. 317, where Roberts *v.* Turner is distinguished.

[4] Ante, § 451, 452. See also, § 457, 495, 496; Schroyer *v.* Lynch, 8 Watts, R. 433; s. c. 2 Law Reporter, 229, 230.

[5] Dale *v.* Hall, 1 Wils. R. 281. See Mershon *v.* Hobensack, 2 Zabriskie (N. J.), R. 382.

was in fact guilty of no negligence was improperly admitted in his defence. It is difficult to perceive how, upon the actual frame of the declaration, any general responsibility as a common carrier could be inferred. And the case, if it proceeded upon the notion that every carrier by water for hire was to be deemed a common carrier, and responsible as such, is inconsistent with later decisions.[1]

§ 505. In order to charge a person as a common carrier, it is not necessary that a specific sum should be agreed on for the hire; for if none is agreed on, he is entitled to a reasonable compensation, upon the same principles which govern in every other contract for hire.[2]

§ 506. Where several persons are engaged as partners in the business of common carriers on land, and by contract between themselves one finds horses and drivers for certain stages of the route, and the other supplies them for the remaining stages, they are, notwithstanding, to be treated as partners, and jointly responsible throughout the whole course of their route.[3] The same principle applies to different partners in a coach-office, who are owners or partners in different coaches employed at the same office on the common business.[4] Although they have not a common interest in each coach, yet all of them will be held responsible as partners upon any contract made by the keeper of the office for the carriage of any package, sent by either of the coaches in which the keeper is a partner, and of course for the loss thereof.[5] [So, where three

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[1] Hutton *v.* Osborne, 1 Selw. N. P. 10th edit. p. 399, note (6); Robinson *v.* Dunmore, 2 Bos. & Pull. R. 417; Satterlee *v.* Groat, 1 Wend. R. 272; Boucher *v.* Lawson, Cas. Temp. Hard. 194; Ante, § 457.

[2] Bastard *v.* Bastard, 2 Shower, R. 81; Lovett *v.* Hobbs, 2 Shower, R. 129; Coggs *v.* Bernard, 2 Ld. Raym. 909, 918; Allen *v.* Sewall, 2 Wend. R. 327; Ante, § 374 to 377.

[3] Weyland *v.* Elkins, Holt, N. P. 227; s. c. 1 Stark. R. 272; Fairchild *v.* Slocum, 19 Wend. R. 329; s. c. 7 Hill, R. 292; Weed *v.* Sarat. & Schenec. Railroad Co. 19 Wend. R. 534; Noyes *v.* Rutland & Burlington Railroad Co. 1 Wms. (Vt.), 110. But see Post, § 538.

[4] Helsby *v.* Mears, 5 Barn. & Cress. R. 506; Bostwick *v.* Champion, 11 Wend. R. 571.

[5] Helsby *v.* Mears, 5 Barn. & Cress. R. 504. See Lacoste *v.* Sellick, 1 Louis. Ann. R. 336.

separate railroad companies, owning distinct portions of a continuous railroad between two termini, run their carriages over the whole road, employing the same agents to sell passage tickets, and receive luggage to be carried over the entire road, an action may be maintained against one of them for the loss of luggage received at one terminus to be carried over the whole road.[1] But where three distinct sets of passenger carriers, one on the Atlantic Ocean, one on the Isthmus of Nicaragua, and one on the Pacific Ocean, combined their means of transportation, and so arranged them that the several routes formed a continuous and connected line from New York to San Francisco, included by the agent in a single advertisement, but without any joint interest in the passage-money, and no agreement as to its division, or the proportion which each set of owners was to receive; each making its own charge for passage, and issuing separate tickets to passengers, and there was no agreement to share any profit and loss, but on the contrary, each set of owners had its own profits, and paid its own losses, and had no interest in the profits or losses of the others, this was held to create no partnership among the carriers.[2] So, where a carrier upon the New York canals agreed with a carrier on the great lakes, for a division in certain proportion of the total freight which should be received for the carriage of goods, which after being carried over either line, should be carried over the other, during the season of navigation, this was held not to constitute a partnership, as between themselves or as to third persons; and if one line pay such proportion to the other for goods carried over the latter, and claim the whole freight of the consignee, he cannot set up a claim against the first carrier for damage to the goods so carried.[3]]

§ 507. Common carriers are not only responsible for their own acts, but also for the acts of their servants, and of other persons in their employment.[4] The same rule prevails in the

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[1] Hart *v.* Rensselaer & Saratoga Railroad Co. 4 Selden, R. 37.

[2] Briggs *v.* Vanderbilt, 19 Barbour, R. 222.

[3] Merrick *v.* Gordon, 6 Smith (20 N. Y. R.), 93, distinguishing and explaining Champion *v.* Bostwick, 18 Wend. 175.

[4] Cavenagh *v.* Such, 1 Price, R. 328; Williams *v.* Cranston, 2 Stark. R. 82;

Roman law.[1] And any arrangement made between the carriers and their servants or agents, whereby the latter are exclusively to receive the compensation for the carriage of particular packages (such as money), will not exempt the carriers from responsibility for the loss of such packages, unless such arrangement is known to the owner thereof, so that he contracts exclusively with the servants and agents.[2]

§ 507 *a*. Common carriers are also responsible for the wrongful acts of mere strangers, in regard to the property bailed to them for transportation, notwithstanding they are not personally, or by their servants, guilty of any negligence or omission of duty; for the case is not within the exception of the act of God, or of the public enemy; and they have their remedy over against the wrongdoer for the damages they may sustain thereby.[3] Thus, carriers are liable for a loss by an accidental fire or conflagration in a city, while the goods are in their custody.[4] This is different from the rule of the Roman law, which in such a case exempted them from liability. *Ad eos, qui servandum aliquid conducunt, aut utendum accipiunt, damnum injuriâ ab alio datum non pertinere, procul dubio est. Quâ enim curâ aut diligentiâ consequi possumus, ne aliquis damnum nobis injuriâ det?*[5]

§ 508. Secondly. What are the duties and obligations of

Middleton *v.* Fowler, 1 Salk. R. 282; 1 Bell, Comm. p. 455, 465, 471, 5th edit.; Hyde *v.* Trent & Mersey Navigation Co. 5 Term R. 397; Ellis *v.* Turner, 8 Term R. 531; Boyce *v.* Chapman, 2 Bing. New Cas. 222; Post, § 550. See Story on Agency, § 452 to 461.

[1] Pothier, Pand. Lib. 19, tit. 2, n. 31; Dig. Lib. 19, tit. 2, l. 11.

[2] Allen *v.* Sewall, 2 Wend. R. 327; s. c. 6 Wend. R. 335; 1 Bell, Comm. p. 464, 465, 5th edit.; 1 Bell, Comm. § 397, 4th edit.; Ante, § 500. But see Middleton *v.* Fowler, 1 Salk. R. 282; Citizens' Bank *v.* Nantucket Steamboat Company, 2 Story, R. 16. See Hosea *v.* McCrory, 12 Ala. R. 349; Knox *v.* Rives, 14 Ala. R. 259.

[3] Ante, § 492; Post, § 526, 528; Proprietors of Trent & Mersey Navigation *v.* Wood, 3 Esp. R. 127; s. c. 4 Doug. R. 287; Abbott on Shipp. Pt. 3, ch. 3, § 9, 5th edit.; Id. ch. 4, § 1; Barclay *v.* Cuculla y Gana, 3 Doug. R. 389.

[4] Hyde *v.* Trent & Mersey Navig. Co. 5 Term R. 389; Gatliffe *v.* Bourne, 4 Bing. New Cas. 314, 332; 2 Kent, Comm. Lect. 40, p. 597, 598, 4th edit.; Post, § 511, 528.

[5] Dig. Lib. 13, tit. 6, l. 19; Pothier, Pand. Lib. 19, tit. 2, n. 30.

common carriers. One of the duties of a common carrier is to receive and carry all goods offered for transportation by any persons whatsoever upon receiving a suitable hire. This is the result of his public employment as a carrier; and according to the custom of the realm, if he will not carry goods for a reasonable compensation, upon a tender of it, and a refusal of the goods, he will be liable to an action, unless there is a reasonable ground for the refusal.[1] [And he has no right to

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[1] Bac. Abridg. *Carriers*, B.; Boulston *v.* Sandiford, Skin. R. 279; Jackson *v.* Rogers, 2 Shower, R. 327; Rex *v.* Kilderby, 1 Saund. R. 312 *c*, note (2); Riley *v.* Horne, 5 Bing. R. 217, 224; Macklin *v.* Waterhouse, 5 Bing. R. 212; Hollister *v.* Nowlen, 19 Wend. R. 234, 239; Cole *v.* Goodwin, 19 Wend. R. 251, 261, 271, 272; Crouch *v.* London & Northwestern Railway Co. 2 Carrington & Kirwan, N. P. R. 789; s. c. 25 Eng. Law and Eq. R. 287; Parker *v.* Great Western Railway Co. 7 Manning & Granger, R. 253. [By special acts, a railway company was entitled to charge for goods carried on their line, at rates not exceeding certain rates per ton. They were permitted to charge a higher rate for small parcels not exceeding 500 lbs. weight, provided, that "articles sent in large aggregate quantities, although made up of separate parcels, such as bags of sugar, coffee, meal, and the like, shall not be deemed small parcels, but such terms shall apply only to single parcels in separate packages." The plaintiff, a carrier, sent to the company at once, many packages, all consigned to one consignee, each less than 500 lbs., of articles of similar classes, but not being separate packages of one article. The company charged for them as separate parcels. It was held, that they were justified in so doing; the proviso applying only to articles that were of such a nature, that a large quantity was generally made up in separate packages. The plaintiff also sent a parcel of coffee less than 500 lbs. weight; and afterwards, on the same day, another parcel of coffee, both consigned to himself, and for the same train. When the first was left, notice was given that the plaintiff probably would send more; but it was not received on any special terms. The company charged for these as separate parcels. It was held, that they were justified in doing so. The company were entitled to charge a certain rate "for all cotton and other wools, drugs, and manufactured goods." Held, that this meant, not all goods on which human skill was employed, but those articles made in what are in popular language called manufactories. The company agreed with agents to collect and deliver goods for them, charging the public a small charge for doing so, in addition to the charge for conveyance on the railway; to those agents the company allowed in addition a sum out of the receipts of the company. The plaintiff, who collected and delivered his own parcels, but was charged as highly as the rest of the public, complained that in effect, this arrangement caused his goods to be charged higher than those sent through the agents, and that the difference was an overcharge. By their act the company were to charge all

charge one higher rates than he serves others for.[1]] And a tender is not necessary, if the party avers and proves his readiness and willingness to pay the money for the carriage.[2] If a carrier refuses to take charge of goods because his coach is full; or because the goods are of a nature which will at the time expose them to extraordinary danger, or to popular rage; or because the goods are not of a sort which he is accustomed to carry;[3] or because he has no convenient means of carrying such goods with security; or because they are brought at an unseasonable time; these will furnish reasonable grounds for his refusal; and will, if true, be a sufficient legal defence to a suit for the non-carriage of the goods.[4] A carrier is not obliged to receive goods, until he is ready to set out on his accustomed journey.[5]

§ 509. Another duty of carriers is, to take the utmost care of goods from the moment of receiving them; to obey the directions of the owner in respect to them;[6] [and if the direction is countermanded, to redeliver them to the consignor;][7] to carry them safely to the proper place of destination,[8] [by the

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persons equally for conveyance, but there was a proviso that they might make agreements, as to the collection and delivery of merchandise; and there was an appeal given by the Act to the Sessions, by any one prejudiced against any arrangement giving special facilities to others. It was held, that, under these enactments, the agreement with the agents, against which there had been no appeal, did not render the charges to the plaintiff overcharges. Parker *v.* Great Western Railway Co., 6 Ellis & Blackburn, 77.]

[1] Crouch *v.* London & Northwestern Railway Co. 25 Eng. Law and Eq. R. 287; 14 Com. B. R. 255. But see Baxendale *v.* Eastern Counties Railway, 4 J. Scott (N. S.), 62.

[2] Pickford *v.* The Grand Junction Railway Co. 9 Dowl. Practice Cases, 766.

[3] Johnson *v.* Midland Railway Co. 4 Exch. R. 367.

[4] Jackson *v.* Rogers, 2 Shower, R. 327; Rex *v.* Kilderby, 1 Saund. R. 312, note; Lane *v.* Cotton, 1 Ld. Raym. R. 646; Batson *v.* Donovan, 4 Barn. & Ald. R. 32; Lovett *v.* Hobbs, 2 Shower, R. 128; Anon. 12 Mod. R. 3; Edwards *v.* Sherratt, 1 East, R. 604.

[5] Lane *v.* Cotton, 1 Ld. Raym. R. 652; s. c. 1 Comyns, R. 105.

[6] Streeter *v.* Horlock, 1 Bing. R. 34; s. c. 7 Moore, R. 283; Dunseth *v.* Wade, 2 Scam. R. 285; Sager *v.* Portsmouth, &c. R. R. Co. 31 Maine, R. 238.

[7] Scotthorn *v.* South Staffordshire Railway Co. 18 Eng. Law and Eq. R. 553; 8 Exch. R. 341.

[8] Kemp *v.* Coughtry, 11 Johns. R. 107; Brind *v.* Dale, 8 Carr. & Payne,

usual and ordinary route;[1]] and to make a right delivery of them there, according to the usage of trade, or the course of business.[2] Or to express the duty of carriers as implied by law in a more general form, it is safely and securely to carry the goods to their place of destination, and there deliver them in a reasonable time, and in a reasonable manner.[3] [But it has been thought, that if there is no express agreement to transport the goods within a specified time, they are not responsible for delays in the transportation occurring by an unusual amount of freight, more than sufficient for the capacity of the road to carry.[4] At all events mere delay in the transportation, will not make the carrier guilty of a conversion, and so liable for the whole value of the goods, although he may be responsible for damages caused by the delay.[5]] It is not sufficient to carry the goods to the place of destination, and there place them on a wharf, but due notice should be given to the consignee of their arrival, and the goods placed in a safe custody, so that he may upon such notice remove them in a reasonable time.[6] [And the carrier's liability continues until the consignee has had a reasonable time after notice to remove the goods.[7]]

N. P. R. 207; s. c. 2 Mood. & Rob. R. 80; DeMott *v.* Laraway, 14 Wend. R. 225.

[1] Powers *v.* Davenport, 7 Blackf. R. 497.

[2] Selw. N. P. *Carriers*, p. 323; Streeter *v.* Horlock, 7 Moore, R. 283; s. c. 1 Bing. R. 34; Hyde *v.* Trent & Mersey Nav. Co. 5 T. R. 389; Forward *v.* Pittard, 1 T. R. 27; Ellis *v.* Turner, 8 T. R. 531; Davis *v.* Garrett, 6 Bing. R. 716; Brind *v.* Dale, 8 Carr. & P., N. P. R. 207; s. c. 2 Mood. & Rob. 80; DeMott *v.* Laraway, 14 Wend. 225. [It has been decided that a railway company has no right to open a parcel, to ascertain whether it contains other parcels addressed to different persons. Crouch *v.* London & Northwestern Railway Co. 2 Carr. & Kirwan, N. P. R. 789; s. c. 25 Eng. Law and Eq. R. 287.]

[3] Raphael *v.* Pickford, 5 Man. & Gr. R. 551; s. c. Jurist (1843), p. 815.

[4] Wilbert *v.* New York and Erie Railroad Co. 2 Kernan, R. 245, Hand, J., dissenting; likewise Gardiner, C. J.

[5] Scovill *v.* Griffith, 2 Kernan, R. 509; Hawkins *v.* Hoffman, 6 Hill, R. 586. But see Denny *v.* N. Y. Central Railroad, 13 Gray, 483; Post, § 516.

[6] Bourne *v.* Gatliff, 11 Clark & Fin. R. 45, 70; Rome Railroad Co. *v.* Sullivan, 14 Georgia R. 277.

[7] Price *v.* Powell, 3 Comst. R. 322; Michigan Central R. R. Co. *v.* Ward, 2 Mich. R. 538; Moses *v.* Boston & Maine Railroad, 32 N. H. R. 523. But see

They are also bound to provide suitable vehicles for the transportation, with all reasonable equipments, and servants to take care of them.[1] And if any loss or damage happen from any defect in the vehicles, they will [in the absence of any special contract exonerating them [2]] be responsible therefor.[3] If the carriage is to be by water, they are bound to provide a ship, tight, stanch, and strong, and suitably equipped for the voyage, with proper officers and a proper crew;[4] to proceed without deviation to the proper port; to expose the goods to no improper hazards; and to guard against all injuries incident to the property, by reasonable care in preserving the goods from the effects of storms, of bad air, of leakages, and of embezzlements.[5] In short every carrier is bound to all the diligence which prudent and cautious men, in the like business, usually employ for the safety and preservation of the property confided to their charge. If the carrier deviates from the voyage, he is responsible for all losses, even from inevitable casualty; for under such circumstances the loss is traced back through all the intermediate causes to the first departure from duty.[6] In these cases, however, the loss is supposed to be one which might not have occurred, unless from the default, or miscon-

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Norway Plains Co. *v.* Boston & Maine Railroad, 1 Gray, 263; Michigan Central Railroad Co. *v.* Hale, 6 Mich. 244.

[1] Camden & Amboy Railroad Company *v.* Burke, 13 Wend. R. 611, 626 to 628; Abbott on Shipp. P. 3, ch. 3, § 2, 3, 4, 5, 5th edit.; Lyon *v.* Mells, 5 East, R. 428.

[2] See Chippendale *v.* Lancashire and Yorkshire Railway Co. 7 Eng. Law & Eq. R. 395.

[3] Ibid. See Dig. Lib. 19, tit. 2, l. 19, § 1; Pothier, Pand. Lib. tit. 2, n. 63; Bell *v.* Reed, 4 Binn. R. 127; Sharp *v.* Grey, 9 Bing. R. 457; Camden & Amboy Railroad Company *v.* Burke, 13 Wend. R. 611, 627, 628; Post, § 571 *a*, 592.

[4] Lyon *v.* Mells, 5 East, R. 428; Amies *v.* Stevens, 1 Str. R. 128; Bell *v.* Reed, 4 Binn. R. 127; Abbott on Shipp. P. 3, ch. 3, § 2, 3, 5, 5th edit.; Camden & Amboy Railroad Company *v.* Burke, 13 Wend. R. 611, 627, 628; Sharp *v.* Grey, 9 Bing. R. 457.

[5] Abbott on Shipp. P. 3, ch. 3, § 1 to 12, 5th edit.; Lyon *v.* Mells, 5 East, R. 428; Post, § 516.

[6] Ante, § 413 *a* to 413 *d*; Post, § 515; Davis *v.* Garrett, 6 Bing. R. 716; Crosby *v.* Fitch, 12 Connect. R. 410; Hand *v.* Baynes, 4 Whart. R. 204.

duct, or deviation of the carrier; for there is, or at least may be, an exception in cases where the same loss must certainly have occurred from the same cause, if there had been no such default, misconduct, or deviation.[1]

§ 510. Thirdly. What are the risks for which common carriers are liable by the common law. These have been already stated to be the risks of all losses, except by the act of God, or of the king's enemies.[2] But as it is a matter of some nicety to decide what cases fall within the exception, and as the point has undergone repeated adjudications, it is proposed here to collect the result of the principal authorities.[3] [Whatever events may come within these terms, the law in regard to them does not apply until the bailment commences; and the falling of a river, before a carrier commences to transport the goods, will be no defence to his previous express contract to carry them in a reasonable time.[4]]

§ 511. (1) What are, and what are not, losses by the act of God. The expression, act of God, denotes (as has been stated in another place) natural accidents, such as lightning, earthquakes, and tempests; and not accidents arising from the negligence of man.[5] Under this expression are said to be comprehended all misfortunes and accidents arising from inevitable necessity, which human prudence could not foresee or prevent.[6] [Accordingly, an exception in a bill of lading by a common carrier by land, "of unavoidable dangers and accidents of the road," has been held to be no restriction of his

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[1] See Ante, § 413, 413 *a* to 413 *d*, and Post, § 515, and the authorities cited under these sections. Crosby *v.* Fitch, 12 Connect. R. 410; Powers *v.* Mitchell, 3 Hill, R. 545.

[2] Ante, § 489, 490; Post, § 550; 1 Dane, Abr. ch. 17, art. 5; McArthur *v.* Sears, 21 Wend. R. 190.

[3] See Jones on Carriers, p. 15 to 20.

[4] Collier *v.* Swinney, 16 Misso. R. 484.

[5] Ante, § 25; Jones on Bailm. 103 to 107; Id. 122; Co. Litt. 89 (*a*); Coggs *v.* Bernard, 2 Ld. Raym. 909, 917; Lane *v.* Cotton, 12 Mod. R. 480; Forward *v.* Pittard, 1 Term R. 33; Abbott on Shipp. P. 3, ch. 4, § 1, 5th edit.; Park on Insur. ch. 3; Phillips on Insur. ch. 13, § 7; Parker *v.* Flagg, 26 Maine, R. 181.

[6] Williams *v.* Grant, 1 Connect. R. 487.

general liability.[1] In a recent case[2] it was said that a carrier is liable for an injury to goods caused by inevitable accident — an extraordinary flood — if by his culpable negligence or unexcused and unreasonable delay in the transportation, he unnecessarily exposes the goods to peril.] Lord Mansfield in one case said, that the act of God means something in opposition to the act of man; for every thing is the act of God, that happens by his permission; every thing by his knowledge.[3] The freezing up of a river or canal, upon which the goods are to be transported during their progress, is deemed an intervention of the *vis major*, or act of Providence, which will excuse the delay, and even the loss of the goods, if occasioned thereby; unless, indeed, the carrier omits to exercise in all other respects due diligence, or to use due precautions to overcome or to avoid the obstruction.[4] [Striking on an unknown snag in the usual channel of a river has sometimes been thought an "act of God," and to excuse the carrier,[5] although this doctrine has not always been received with satisfaction.[6]] But a loss by

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[1] Walpole *v.* Bridges, 5 Blackford, R. 222. And see Morrison *v.* Davis, 8 Harris (Penn.), R. 171.

[2] Read *v.* Spaulding, 5 Bosw. 396.

[3] Forward *v.* Pittard, 1 T. R. 33.

[4] Bowman *v.* Teall, 23 Wend. R. 306; Parsons *v.* Hardy, 14 Wend. R. 215; Harris *v.* Rand, 4 New Hamp. R. 259; Lowe *v.* Moss, 12 Ill. R. 477; Post, § 545 *a*.

[5] Smyrl *v.* Niolon, 2 Bailey, R. 421. And see Williams *v.* Grant, 1 Conn. R. 487; Faulkner *v.* Wright, Rice (S. Car.), R. 107.

[6] [Friend *v.* Woods, 6 Gratt. R. 189. Daniel, J., said: "Among the strongest authorities cited in behalf of the plaintiffs in error are the cases of Smyrl *v.* Niolon, 2 Bailey, R. 421, and Williams *v.* Grant, 1 Conn. R. 487. In the former it was held that a loss occasioned by a boat's running on an unknown 'snag' in the usual channel of the river, is referable to the act of God, and that the carrier will be excused; and in the latter it was said that striking upon a rock in the sea not generally known to navigators, and actually not known to the master of the ship, is the act of God. And other authorities go so far as to assert, that if an obstruction be secretly sunk in the stream, and not being known to the carrier, his boat founder, he would be excused. The last proposition stands condemned by the leading cases, both English and American. In the case of Forward *v.* Pittard, 1 T. R. 27, Lord Mansfield says, that 'to prevent litigation, collusion, and the necessity of going into circumstances impos-

fire, not arising from the act of God, as, for example, a loss arising from an accidental fire or conflagration in a city [or

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sible to be unravelled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such an accident as *could not happen by the intervention of man*, as storms, lightning, and tempests.' The same doctrine is strongly stated in M'Arthur *v.* Sears, 21 Wend. R. 196, where it is said, that 'no matter what degree of prudence may be exercised by the carrier and his servants; although the delusion by which it is baffled, or the force by which it is overcome, be inevitable; yet if it be the result of human means, the carrier is responsible.'

"These cases clearly restrict the excuse of the carrier for losses occasioned by obstructions in the stream, to such obstructions as are wholly the result of natural causes. And the cases in which the carriers have been exonerated from losses occasioned by such obstructions, as Smyrl *v.* Niolon, and Williams *v.* Grant, before mentioned, will, I think, upon examination, be found to be cases in which either the bills of lading contained the exception 'of the perils of the river,' or in which that exception has been confounded with the exception of the 'act of God.' In the case of M'Arthur *v.* Sears, a distinction between the two phrases is pointed out. It is shown that the exception 'of dangers or perils of the sea or river,' often contained in bills of lading, are of much broader compass than the words 'act of God;' and the case of Gordon *v.* Buchanan, 5 Yerg. R. 71, is cited with approbation, in which it is said that 'many of the disasters which would not come within the definition of the act of God, would fall within the former exception; such for instance as losses occasioned by hidden obstructions in the river newly placed there, and of a character that human skill and foresight could not have discovered and avoided.'

"In a note to the case of Coggs *v.* Bernard, in the American edition of Smith's Leading Cases, 43 Law Lib. 180, the American decisions are collated and reviewed, and a definition is given to the expression 'act of God,' which expresses, I think, with precision, its true meaning. The true notion of the exception is there held to be 'those losses that are occasioned exclusively by the *violence of nature;* by that kind of force of the elements, which human ability could not have foreseen or prevented; such as lightning, tornadoes, sudden squalls of wind.' 'The principle that all human agency is to be excluded from creating or entering into the cause of mischief, in order that it may be deemed the act of God, shuts out those cases where the natural object in question is made a cause of mischief, solely by the act of the captain in bringing his vessel into that particular position where alone that natural object could cause mischief; rocks, shoals, currents, &c., are not, by their own nature and inherently, agents of mischief and causes of danger, as tempests, lightning, &c., are.'

"The act of God which excuses the carrier must therefore, I think, be a direct and violent act of nature.]

from the explosion of a steam boiler,[1]] without any default whatsoever on the part of the carrier, will furnish no excuse for the carrier, for it does not fall within the exception.[2]

§ 512. Many questions arising under this head have been discussed in cases of carriers by sea, where there has been a bill of lading containing the common exception of the "perils of the sea."[3] What is the precise import of this phrase is not, perhaps, very exactly settled.[4] In a strict sense, the words "perils of the sea" denote the natural accidents peculiar to that element; but in more than one instance these words have been held to extend to events not attributable to natural causes.[5] Thus, they have been held to include captures by pirates on the high seas,[6] and losses by collision of two ships, where no blame is imputable to either, or at all events where none is imputable

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[1] McCall *v.* Brock, 5 Strobh. R. 119; The Bark Edwin, Sprague's Dec. 478.

[2] Hyde *v.* Trent & Mersey Nav. Co. 5 Term Rep. 389; Gatliffe *v.* Bourne, 4 Bing. New Cas. 314, 322; Parker *v.* Flagg, 26 Maine, R. 181; Ante, § 507 *a*; Post, § 528; Morewood *v.* Pollok, 1 El. & Bl. 743; 18 Eng. Law & Eq. R. 341; Graff *v.* Bloomer, 9 Barr (Penn.), R. 114; Gilmore *v.* Carman, 1 Smedes & Marshall, R. 279; Swindler *v.* Hilliard, 2 Richardson, R. 286; Singleton *v.* Hilliard, 1 Strobh. R. 203; Hale *v.* N. J. Steam Nav. Co. 15 Conn. R. 539; Miller *v.* Steam Navigation Co. 6 Selden, 431.

[3] See Abbott on Shipp. P. 3, ch. 4, § 1 to 6, 5th edit.; Smith *v.* Shepherd, cited p. 383 (5th Am. ed.), note (*f*).

[4] See Pothier, Traité de Dépôt, n. 32.

[5] Abbott on Shipp. P. 3, ch. 4, § 1 to 6, 5th edit.; Park, Insur. ch. 3; Marsh. Insur. B. 1, ch. 7, p. 214; Id. B. 1, ch. 12, § 1, p. 487; Id. B. 2, ch. 5, p. 753; 1 Bell, Comm. p. 559, 579, 5th edit.; 1 Bell, Comm. § 501, 517, 518, 4th edit. Sir William Jones has remarked, that "the word peril, like periculum, from which it is derived, is in itself ambiguous, and sometimes denotes the risk of inevitable mischance, and sometimes the danger arising from the want of due circumspection." Jones on Bailm. 98; Dig. Lib. 47, tit. 5, l. 1, § 4. Lord Mansfield, in Forward *v.* Pittard, 1 Term Rep. 33, said: "There is a nicety of distinction between the act of God, and inevitable necessity."

[6] Abbott on Shipp. P. 3, ch. 4, § 1, 2, 5th edit.; 1 Bell, Comm. p. 559, 5th edit.; 1 Bell, Comm. § 501, 4th edit. The Roman law held a loss by pirates to be by inevitable causalty. Si quid naufragio, aut per vim piratarum perierit, non esse iniquum, exceptionem ei dari. Dig. Lib. 4, tit. 9, l. 3, § 1; 3 Kent, Comm. Lect. 47, p. 216, 217, 4th edit.; Id. 299, 300; Pickering *v.* Barclay, 2 Roll. Abridg. 248, cited Abbott on Shipp. p. 385, 5th Am. edit.; Barton *v.* Wolliford, Comberb. R. 56; Ante, § 37, and note; Pothier, Traité de Dépôt, n. 32; 1 Phillips on Insur. ch. 13, § 7, p. 249; Post, § 526.

to the injured ship.[1] [But loss by theft or robbery is a "peril of the seas," only when it is a piracy on the high seas; but not when it is committed by persons on board the vessel, or persons coming to her, when she is not on the high seas. Neither is embezzlement a peril of the seas.[2]] It has been said, that by "perils of the sea" are properly meant no other than inevitable perils or accidents upon that element; and that by such perils or accidents common carriers are, *primâ facie*, excused, whether there is a bill of lading containing an express exception of "perils of the sea," or not.[3] If the law be so, then the decisions upon the exact meaning of these words become important, in a practical view, in all cases of maritime and water carriage.[4] [Bills of lading sometimes contain exceptions of the "dangers of the seas, roads, and rivers." This clause, "dangers of the roads," is in such cases understood to mean dangers of roads where ships lie at anchor, or such dangers on land as more immediately occur on roads, such as the overturning of carriages and the like, but not a loss by thieves while the goods are in transit.[5] But perhaps the phrase, "dangers and accidents of the seas and navigation" has a broader meaning than "the perils of the seas." Thus, where a vessel laden with goods arrived at London, and was taken into the commercial dock to discharge, and for this purpose was fastened by tackle on one side to a loaded lighter out-

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[1] Ibid.; Smith *v.* Scott, 4 Taunt. R. 126; Whitesides *v.* Thurlkill, 12 Sm. & Mar. R. 599. [But see Plaisted *v.* Boston & Kennebec Steam Navigation Co. 27 Maine, R. 132. In this case, although there was no exception of the "perils of the sea," the owners of a steamboat, being common carriers, were held liable for shipment on board of her, lost by collision with another vessel at sea, and without fault imputable to either. And see Mershon *v.* Hobensack, 2 Zabriskie (N. J.), R. 372.] 3 Kent, Comm. Lect. 47, p. 230, 231, 4th edit.; Abbott on Shipp. P. 3, ch. 4, § 5, 5th edit.; Id. P. 3, ch. 8, § 12, 5th edit.; Buller *v.* Fisher, 3 Esp. R. 67; 1 Bell, Comm. p. 579, 580, 581, 5th edit.; 1 Bell, Comm. § 518 to 520, 4th edit.; Post, § 514, 518.

[2] King *v.* Shepherd, 3 Story, R. 349.

[3] Per Church, J., in Crosby *v.* Fitch, 12 Connect. R. 419; Williams *v.* Grant, 1 Connect. R. 487. But see Marsh. Insur. B. 1, ch. 7, p. 214.

[4] Plaisted *v.* Boston & Kennebec Steam Navigation Co. 27 Maine, R. 132.

[5] De Rothschild *v.* The Royal Mail Steam Packet Co. 7 Exch. R. 734; 14 Eng. Law & Eq. R. 331, and Bennett's note.

side of her, and on the other to a barge lying between her and the wharf; and the tackle broke where she was fastened, and in consequence she canted over, and water got in through the port holes, and damaged the goods, this was held within the exception of the dangers of the seas and navigation.[1]]

§ 512 *a*. The phrase, "perils of the sea," whether understood in its most limited sense, as importing a loss by natural accidents peculiar to that element, or whether understood in its more extended sense, as including inevitable accidents occurring upon that element, must still, in either case, be understood to include such losses only to the goods on board as are of an extraordinary nature, or arise from some irresistible force, or from inevitable accident, or from some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence.[2] Hence it is, that, if the loss occurs by a peril of the sea which might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be, in the sense of the phrase, such a loss by the perils of the sea as will exempt the carrier from liability, but rather a loss by the gross negligence of the party.[3] [So where a steamboat on the Ohio River ran upon a stone and knocked a hole in her bottom, the carrier, notwithstanding the clause in his bill of lading, "the dangers of the sea only excepted," could not relieve himself from responsibility without showing due diligence and proper skill, and that the accident was unavoidable.[4]] A loss by ordinary

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[1] Laurie *v.* Douglas, 15 Mees. & Welsb. R. 746.

[2] Abbott on Shipp. Pt. 3, ch. 4, § 1 to 8, 5th edit.; 3 Kent, Comm. Lect. 48, p. 299, 300, 3d edit.; Id. Lect. 47, p. 216, 217; The Schr. Reeside, 2 Sumner, R. 567; Colt *v.* McMechen, 6 Johns. R. 160; Potter *v.* Suffolk Insurance Company, 2 Sumner, R. 197; Hollingworth *v.* Brodrick, 7 Adolph. & Ell. R. 40; Waters *v.* Merchants Louisville Insurance Company, 11 Pet. R. 213; Post, § 516 to 519.

[3] Ibid.; 1 Bell, Comm. p. 559, 560, 5th edit.; 1 Bell, Comm. § 501, 4th edit.; Ante, § 414, 492; 3 Kent, Comm. Lect. 47, p. 216, 217, 3d edit.; Id. 230, 231; Id. Lect. 48, p. 300, 301, 3d edit.; Roccus de Nav. 55, 56; Abbott on Shipp. P. 3, ch. 4, § 1 to 6, 5th edit.; Crosby *v.* Fitch, 12 Connect. R. 410, 419 to 422; Fairchild *v.* Slocum, 19 Wend. 329; Whitesell *v.* Russell, 8 Watts & Serg. R. 44.

[4] Whitesell *v.* Russell, 8 Watts & Serg. R. 44.

wear and tear in the course of the voyage is not a loss by the perils of the sea.[1] So a loss directly and immediately occasioned by the ignorance or inattention of the master and mariners is not deemed a loss by the perils of the sea.[2] But the effect of storms and tempests in straining the ship or causing her to spring a leak, or to ship a sea, whereby damage or injury is done to the goods on board, are losses properly attributable to the perils of the sea, although in a mitigated sense they may be said to be ordinary accidents.[3] [But it may be the carrier's duty in some cases to dry the goods which have been wet, if this can be done by any ordinary and reasonable exertions.[4]]

§ 513. It seems that a loss occasioned by a leakage, which is caused by rats gnawing a hole in the bottom of the vessel, is not in the English law deemed a loss by a peril of the sea, or by inevitable casualty.[5] But if the master has used all reasonable precautions to prevent such a loss, as by having a cat on board, by the general consent of the writers upon the foreign maritime law, it [has been] held to be a loss by a peril of the sea, or inevitable accident.[6] [The contrary was expressly held

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[1] Ibid.; Hazard *v.* New England Marine Insurance Co. 1 Sumner, R. 218; s. c. 8 Pet. R. 557; 3 Kent, Comm. Lect. 48, p. 299, 300, 4th edit.; Ante, § 492 *a*.

[2] 3 Kent, Comm. Lect. 48, p. 299, 300, 3d edit.; 1 Bell, Comm. p. 559, 560, 5th edit.; 1 Bell, Comm. § 501, 4th edit.; Proprietors of Trent & Mersey Navigation *v.* Wood, 3 Esp. R. 127; s. c. 4 Doug. R. 287.

[3] 1 Bell, Comm. p. 560, 5th edit.; 1 Bell, Comm. § 501, 4th edit.; Abbott on Shipp. P. 3, ch. 3, § 9, 5th edit.

[4] Chouteaux *v.* Leech, 6 Harris (Penn.), R. 224; Bird *v.* Cromwell, 1 Misso. R. 58. But see Steamboat Lynx *v.* King, 12 Misso. R. 272.

[5] Dale *v.* Hall, 1 Wils. R. 281; Hunter *v.* Potts, 4 Camp. R. 203. See Marsh. Insur. B. 1, ch. 7, § 4, p. 242. Sir Wm. Jones (Bailm. 105) says, that the true reason of this decision is not mentioned by the reporter, namely, that it was in fact at least ordinary negligence to let a rat do such mischief in the vessel, and the Roman law had so decided in an analogous case. Dig. Lib. 19, tit. 2, l. 13, § 6; Ante, § 408, 432. But it is impossible to explain the case on this ground, since the defendant positively proved that he had taken all possible care, and was guilty of no negligence; and on this ground the Jury gave a verdict in his favor.

[6] Abbott on Shipp. P. 3, ch. 3, § 9, 5th edit.; Roccus de Navibus, n. 58; Id. de Assecur. n. 49; 1 Emerig. Assecur. 377, 378; Marsh. Insur. B. 1, ch. 7, § 4,

in a recent English case before the Court of Exchequer.[1]] In

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p. 592. But see 3 Kent, Comm. Lect. 48, p. 300, 301, and note (*a*), 4th edit. See Ante, § 408, 432.

[1] [Laveroni *v.* Drury, 8 Exch. R. 166; 16 Eng. Law and Eq. R. 510. Pollock, C. B., said: "In moving for the rule, the learned counsel for the defendants cited various foreign writers of great eminence and authority. Emérigon, vol. 1, p. 375, 376; Consolato del Mare, cap. 65, 66; Roccus, de Navibus, Not. 58; and Story on Bailments, § 513. The foreign authorities first above mentioned lay down the rule distinctly, that a ship's master who keeps cats is excused from damage by rats; but however eminent their authority, and however worthy of attention and consideration their works are, we cannot act upon them in contradiction to the plain and clear meaning of the words of the bill of lading, which is the contract between the parties. As to Mr. Justice Story, he very carefully confines himself to stating that such are the foreign authorities, and, as it seems to us, avoids expressing his own opinion upon the point. He cites a case in the Court of Pennsylvania, where damage by rats was held to be a peril of the sea; Garrigues *v.* Coxe, 1 Binn. 592; but he also refers to another case, Aymar *v.* Astor, 6 Cowen, 266, and to 3 Kent's Comm. 301, where the contrary is stated to be the law.

"It was strongly insisted that the same doctrine was laid down by Lord Tenterden in his book on Shipping, p. 371; and there is no doubt that any opinion coming from him is entitled to the greatest weight and consideration. We do not, however, think Lord Tenterden can be understood as laying down such a rule. He cites the passage from Roccus which states that keeping cats on board excuses the ship-owner from damage by mice, but immediately after states this to be merely an illustration of the general principle, by which masters and owners are held responsible for every injury that might have been prevented by human foresight or care. Now, whatever might have been the case when Roccus wrote, we cannot but think that rats might be now banished from a ship by no very extraordinary degree of diligence on the part of the master. And we further are very strongly inclined to believe that in the present mode of stowing cargoes, cats would offer a very slight protection, if any, against rats. It is difficult to understand how, in a full ship, a cat could get at a rat in the hold at all, or at least with the slightest chance of catching it. But that Lord Tenterden cannot be understood as contended for by the learned counsel for the defendants in the present case, is evident from the authority which he cites for his view of the law. Dale *v.* Hall, 1 Wils. 281. That was an action against a ship-master who carried goods for hire. It was contended for the defendant at the trial that the plaintiff had proved no negligence, and it was proposed to prove that the defendant had taken all possible care of the goods, and that the damage accrued by rats having made a leak in the vessel, whereby water was admitted, and that thereupon every thing possible was done to pump out the water and prevent the damage which happened. The evidence was admitted, and the defendant obtained a verdict. A new trial was moved for, on the

conformity to this rule, the destruction of goods at sea by rats, has, in Pennsylvania, been held a loss by a peril of the sea, where there has been no default of the carrier.[1] On the other hand, the destruction of a ship's bottom by worms, in the course of a voyage, has been deemed not to be a peril of the sea, both in England and America, upon the ground (it seems) that it is a loss by ordinary wear and decay.[2]

§ 514. We have already had occasion to notice, that losses by collision of ships at sea, without any negligence on the part of the injured or lost vessel, are deemed losses by a peril of the sea,[3] or by inevitable casualty.[4]

§ 515. The general rule in cases of insurance is, that the immediate and not the remote cause of the loss is to be considered: *Causa proxima, non remota spectatur.*[5] This rule

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ground that the evidence was not legally admissible, and the rule was made absolute. The Chief Justice stated that the evidence ought not to have been received; that every thing was negligence in a carrier or hoyman that the law does not excuse; that he was answerable for goods the instant he received them, and in all events, except they happened to be damaged by the act of God, or of the king's enemies.

"This is the case stated by Lord Tenterden, in the part of his book above referred to as one, indeed the principal, authority upon the subject; and we entirely concur in it, and it seems to us conclusive in the present case. In our opinion, the application of the principle laid down in this case, affords the only true rule for ascertaining with accuracy and certainty the liability of the master and owner of a general ship, namely, that, *primâ facie*, he is a common carrier, but that his responsibility may be either enlarged or qualified by the terms of the bill of lading, if there be one, and that the question whether the defendant is liable or not, is to be ascertained by the terms of this document when it exists."]

[1] Garrigues *v.* Coxe, 1 Binn. R. 592. But see Aymer *v.* Astor, 6 Cowen, R. 266, and 3 Kent, Comm. Lect. 48, p. 300, 301, 4th edit.

[2] Park, Insur. ch. 3; 3 Kent, Comm. Lect. 47, p. 230, 231, 4th edit.; Id. Lect. 48, p. 300, 4th edit.; 1 Phillips on Insur. ch. 13, § 7, p. 249, 250; Rohl *v.* Parr, 1 Esp. R. 444; Martin *v.* Salem Ins. Co. 2 Mass. R. 429; Hazard *v.* New England Ins. Co. 1 Sumner, R. 218; s. c. 8 Peters, R. 557. But see De Payster *v.* Columbian Ins. Co. 2 Cain. R. 85.

[3] But see Plaisted *v.* Boston & Kennebec Steam Nav. Co. 27 Maine, R. 132.

[4] Buller *v.* Fisher, 3 Esp. R. 67; Abbott on Shipp. P. 3, ch. 4, § 2, 5, 5th edit.; Smith *v.* Scott, 4 Taunt. R. 126; Ante, § 512; McArthur *v.* Sears, 21 Wend. R. 190.

[5] See Busk *v.* Royal Exchange Assurance Co. 2 Barn. & Ald. R. 73; Walker

may in many cases be applicable to carriers.[1] Thus, for example, if a carrier ship should be struck with lightning, and thereby her cargo should be totally destroyed, although there may have been some negligence or misconduct of the master and crew in the voyage, as if a part of it is improperly stowed on deck, there it seems that the whole loss will or may be attributed to the perils of the sea as *causa proxima*, notwithstanding any such negligence or misconduct.[2] [So, where a canal boat was wrecked by an extraordinary flood, the carrier was held not responsible, merely by the fact that one of the horses was lame, thereby causing a delay in passing the place where the accident happened; beyond which place the boat would have been safe;[3] and when a delay is caused by a freshet, and the article carried, in the mean time, falls in value in market, the carrier is not liable for such loss.[4] So where the carrier negligently delays the transportation of goods, and afterwards carries them through safely, he has been held not responsible for injury to them by a freshet after they arrive at such carriers depot, although but for such delay they would not have been exposed to such injury.[5]] So if a carrier-ship be not strictly seaworthy, yet if a loss of goods on board on freight is

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v. Maitland, 5 Barn. & Ald. R. 174; Patapsco Ins. Co. *v.* Coulter, 3 Pet. R. 222; Columbian Insurance Co. of Alexandria *v.* Lawrence, 10 Pet. R. 507; Waters *v.* Merchants Louisville Insurance Co. 11 Pet. R. 213; Delano *v.* Bedford Insurance Co. 10 Mass. R. 351; Shaw *v.* Robberds, 6 Adolph. & Ellis, R. 81; s. c. 1 Nev. & Perry, R. 279, 287; Bishop *v.* Pentland, 7 Barn. & Cress. R. 219; Post, § 517; Abbott on Shipp. P. 3, ch. 4, § 1, 5th edit.; Post, § 520 to 524.

[1] Abbott on Shipp. p. 383 (5th Am. ed.), and Smith *v.* Shepherd, there cited; Post, § 517, 520, 526, 527.

[2] See, on this point, Ante, § 413 *a* to 413 *d*, where this subject is considered at large. Post, § 516 to 519. The weight of authority, though the point is open to controversy, seems to be decidedly against the carrier's liability. See Hastings *v.* Pepper, 11 Pick. R. 41; The Paragon, Ware, R. 322, 324; Davis *v.* Garrett, 6 Bing. R. 716; Hollingworth *v.* Brodrick, 7 Adolph. & Ellis, R. 40; Parker *v.* Flagg, 26 Maine, R. 181.

[3] Morrison *v.* Davis, 8 Harris (Penn.), R. 171. But see Read *v.* Spaulding, 5 Bosw. 408.

[4] Lipford *v.* Charlotte & South Carolina Railroad Co. 7 Richardson, R. 409.

[5] Denny *v.* N. Y. Central Railroad, 13 Gray, 481.

occasioned by a peril of the sea wholly unconnected with the want of seaworthiness, as by being stranded in a hurricane, or captured by an enemy, the loss will not or may not be borne by the carrier, but will or may be deemed a loss by the perils of the sea, or by the capture, as *causa proxima*.[1]

§ 516. But it is not every loss proceeding directly from natural causes which is to be deemed as happening by a peril of the sea; and questions of this sort often turn upon very nice distinctions.[2] Thus, if a carrier ship should perish in consequence of striking against a rock or shallow, the circumstances under which that event has taken place must be ascertained, in order to decide whether it happened by a peril of the sea, or by the fault of the owner, carrier, or master.[3] If the situation of a

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[1] Ante, § 413 *a* to 413 *d*; Post, § 524; Hastings *v.* Pepper, 11 Pick. R. 41; Collier *v.* Valentine, 11 Misso. R. 299; Hart *v.* Allen, 2 Watts, R. 114. In Bell *v.* Reed, 4 Binn. R. 127, Mr. Justice Brackenridge seems to have held at the trial, that the carrier was liable for a loss by unseaworthiness, not occasioned by the unseaworthiness. But as the Jury found a verdict for the carrier, that point was not material, upon the motion for a new trial. Mr. Chief Justice Tilghman, in delivering the opinion against a new trial, said: "The man who undertakes to transport goods by water for hire, is bound to provide a vessel sufficient in all respects for the voyage, well manned, and furnished with sails, anchors, and all necessary furniture. If a loss happens through defect in any of these respects, the carrier must make it good." It is true, that the learned Judge remarked: "The law was laid down fairly, and the fact left to the Jury." But as no complaint was or could be made by the only party (the defendant), who had a right to complain of the ruling at the trial against him, he having a verdict in his favor, it may be doubted if the court meant at all to affirm the doctrine beyond the point by the Chief Justice. See Hastings *v.* Pepper, 11 Pick. R. 41; The Paragon, Ware, R. 322, 324; Hollingworth *v.* Brodrick, 7 Adolph. & Ell. R. 40; Swan *v.* Union Ins. Co. of Maryland, 3 Wheat. R. 168. In this last case, the Supreme Court of the United States held, that the loss must be occasioned by one of the perils in the policy, to entitle the plaintiff to recover, and that, if the actual loss be by the barratry of the owner, which is excepted from the policy, it is of no consequence, that the master had, in a prior part of the voyage, been guilty of barratrous conduct, which did not produce any loss. See Powers *v.* Mitchell, 3 Hill, R. 545, that a subsequent total loss of goods by accident will not excuse the bailee for hire from responsibility for damage or injury sustained by his prior negligence. Ante, § 450 *a*.

[2] Ante, § 492 *a*, 512 *a*; Abbott on Shipp. P. 3, ch. 4, § 6, 5th edit.; 1 Phillips on Insur. ch. 13, § 7, p. 249, &c.

[3] Ibid.

rock or shallow is generally known, and the ship is not forced upon it by adverse winds or tempests, the loss is to be imputed to the fault of the master. And it matters not, in such a case, whether the loss arises from his own rashness in not taking a pilot, or from his own ignorance or unskilfulness.[1] On the other hand, if a ship is forced upon such a rock or shallow by adverse winds or tempests, or if the shallow is occasioned by a sudden and recent collection of sand in a place where ships before could sail with safety; or if the rock or shallow is not generally known; in all these cases the loss is to be attributed to the act of God, and it is deemed a peril of the sea.[2]

§ 517. A remarkable case illustrative of this doctrine occurred. An action was brought against the master of a carrier-vessel, navigating the river Ouse and Humber from Selby to Hull. At the trial, it appeared that at the entrance of the harbor of Hull there was a bank, on which vessels used to lie with safety, but of which a part had been swept away by a great flood some short time before the misfortune in question; so that it had become perfectly steep, instead of shelving toward the river. A few days after this flood a vessel sunk by getting on the bank, and her mast, which was carried away, was suffered to float in the river, tied to some part of the vessel. The defendant's vessel, upon sailing into the harbor, struck against the mast, which, not giving way, forced the defendant's vessel toward the bank, where she struck, and would have remained safe, had the bank been in its former situation. But upon the tide's ebbing, her stern sunk into the water, and the goods were spoiled. Evidence was offered to show that there was no negligence; but it was rejected. The Judge who tried the cause ruled, that the act of God, which would excuse the carrier, must be immediate, and not remote; and a verdict

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[1] Abbott on Shipp. P. 3, ch. 4, § 6, 5th edit.; Id. P. 3, ch. 3, § 9; The William, 6 Rob. R. Adm. 316; 3 Kent, Comm. Lect. 47, p. 217, 4th edit.; 1 Bell, Comm. p. 559, 5th edit.; 1 Bell, Comm. § 501, 4th edit.; Roccus de Nav. n. 55, 56.

[2] Abbott on Shipp. P. 3, ch. 4, § 6, 5th edit.; Elliott *v.* Rossell, 10 Johns. R. 1; Kemp *v.* Coughtry, 11 Johns. R. 107; Post, § 547.

having been found for the defendant, on a motion for a new trial, the doctrine of the Judge at the trial was confirmed.[1] But if the mast, which was the immediate cause of the loss, had not been in the way; but the bank had been suddenly removed by an earthquake, or the removal of the bank had been unknown, and the vessel had gone on the bank in the usual manner, the decision would have been otherwise.[2]

§ 518. In the case above stated, it does not appear that a collision with the mast might not have been guarded against by extraordinary precautions, as it must have been visible on the approach of the vessel; and the masters and owners are certainly responsible for every injury which might have been prevented by human foresight and care. Thus, where, in a voyage from Hull to Gainsborough, a carrier-vessel was sunk by striking against the anchor of another vessel, which anchor lay under water, and without a buoy, whereby some goods were injured, the carriers were held responsible for the loss.[3] The ground of this decision seems to have been, that both parties were guilty of negligence; the one in leaving his anchor without a buoy; the other in not avoiding it, as, when he saw the vessel in the river, he must have known that there was an anchor near at hand.[4] If, however, the anchor had been left by the vessel, and she had departed, and there were no means of distinguishing its situation, the result (it should seem) would have been otherwise.

§ 519. In a case against a carrier for an injury done to a cargo by steam, it appeared that the steam escaped through a crack in the steam-boiler, occasioned by the frost; and the Court held, that, at the season of the year in which such injuries by frost are likely to occur, it is gross negligence in the carrier to fill up his boiler with water over night, without keeping up a suitable fire to prevent such accidents.[5]

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[1] Smith *v.* Shepherd, cited Abbott on Shipp. p. 383, note (*f*), 5th Am. edit.; Id. ch. 3, § 9, 5th edit.; Hahn *v.* Corbett, 2 Bing. R. 205.

[2] Abbott on Shipp. P. 3, ch. 4, § 6, 5th edit.

[3] Proprietors of Trent and Mersey Navigation Co. *v.* Wood, 3 Esp. R. 127; S. C. 4 Doug. R. 287; Abbott on Shipp. P. 3, ch. 3, § 9, 5th edit.

[4] Abbott on Shipp. P. 3, ch. 4, § 5, 5th edit.

[5] Siordet *v.* Hall, 4 Bing. R. 607; Coggs *v.* Bernard, 2 Ld. Raym. R. 909, 911.

§ 519 *a*. *A fortiori*, it is not a loss by the perils of the sea, if the loss is caused by the fraud of the carrier, although otherwise it might be deemed a loss by a peril of the sea. Thus, if a master of a carrier-ship should fraudulently bore holes in the bottom of the ship in order to sink her; or he should fraudulently run her on shore, or fraudulently cut her from her mooring, and she should drift upon rocks; or he should fraudulently desert her at sea, whereby she should founder; in all these cases, if the cargo or freight is lost or damaged, the loss or damage must be borne by the owner of the ship; for it is in no just sense a loss by the perils of the sea.[1] The same result would arise, if the loss had been by the perils of the sea, after a voluntary deviation by the carrier, if it might not have occurred but for such deviation.[2]

§ 520. If a carrier-ship is properly moored in a harbor having a hard, uneven bottom, and on the reflux of the tide, in consequence of a considerable swell, she strikes hard on the bottom, and her knees are injured, and thereby her cargo is damaged; such a loss is to be deemed a loss by the perils of the sea.[3]

§ 521. If a carrier-ship is taken in tow by a ship of war, and in order to keep up she is obliged to use an extraordinary press of sail in a gale of wind, and thereby her cargo is injured, it is a loss by the perils of the sea.[4]

§ 522. If, in moving a ship from one part of a harbor to another, it becomes necessary to send some of the crew on shore to make fast a new line, and to cast off a rope, by which she is made fast, and these men are impressed immediately, before casting off the rope, and thereby the ship goes on shore, it is a loss by the perils of the sea.[5]

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[1] See Waters *v.* The Merchants Louisville Insurance Co. 11 Peters, R. 213.

[2] Hand *v.* Baynes, 4 Whart. R. 204; Ante, § 413 *a* to 413 *d*; Crosby *v.* Fitch, 12 Connect. R. 410, 419, 420, 421.

[3] Fletcher *v.* Inglis, 2 Barn. & Ald. R. 315; Kingsford *v.* Marshall, 8 Bing. R. 458; Potter *v.* Suffolk Insurance Co. 2 Sumner, R. 197. See also, Corcoran *v.* Gurney, 1 El. & Bl. 456; 16 Eng. Law & Eq. R. 215, and Bennett's note; Lake *v.* Columbus Ins. Co. 13 Ohio R. 48.

[4] Hagedorn *v.* Whitmore, 1 Stark. R. 157.

[5] Hodgson *v.* Malcolm, 2 Bos. & Pull. New R. 336.

§ 523. And where a carrier-vessel is beating up a river against a light and variable wind, if, while changing her tack, the wind suddenly fails or changes, and she goes ashore, and her cargo is injured, this also is to be deemed a loss by the act of God, and will excuse the carrier.[1] The same rule will apply to the case where a carrier-vessel is obstructed or frozen up in the ice, in the course of her navigation; and an injury is occasioned thereby.[2]

§ 524. If the carrier-vessel is reasonably sufficient for the voyage, and is lost by a peril of the sea, the carrier will not be chargeable by its being shown that a stouter vessel would have outlived the storm. Nor if a hoy is sunk by being driven by a sudden gust against a pier, will the hoyman be made liable by its being shown that a stronger vessel would have sustained the injury without sinking.[3]

§ 525. The case of a jettison at sea, to save the vessel from foundering, and to preserve the lives of the crew, is (as we shall presently see) a loss by the act of God, although it is accomplished by the immediate agency of man.[4] But it would be otherwise, if the jettison was occasioned by the vessel's being overloaded; as, if a ferryman should overload his boat, and the passenger's goods should on that account be thrown overboard.[5]

§ 526. (2) What are, and what are not, losses by the king's enemies. By enemies is to be understood public enemies, with whom the nation itself is at ŏpen war; and not merely robbers, thieves, and other private depredators, however much they may be deemed in a moral sense at war with society. Losses, therefore, which are occasioned by robbery on the highway, or by the depredations and violence of mobs, rioters, and insurgents, and other felons, are not deemed losses

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[1] Colt *v.* McMechen, 6 Johns. R. 160.

[2] Bowman *v.* Teall, 23 Wend. R. 306; Ante, § 511; Post, § 545 *a*.

[3] Amies *v.* Stevens, 1 Str. R. 128; Abbott on Shipp. P. 3, ch. 4, § 7, 5th edit. But see Christie *v.* Trott, 25 Eng. Law & Eq. R. 262.

[4] Bird *v.* Astcock, 2 Bulst. R. 280; Jones on Bailm. 108; Smith *v.* Wright, 1 Caines, R. 43; Barber *v.* Brace, 3 Connect. R. 9; Post, § 531, 575.

[5] Coggs *v.* Bernard, 2 Ld. Raym. R. 909, 911; Post, § 531, 575.

by enemies within the meaning of the exception.[1] But losses by pirates on the high seas are deemed within it; for they are universally treated as the enemies of all mankind, and are subjected to punishment accordingly.[2] And here the question may often become material, whether we are to look to the immediate or to the remote cause of the loss; for in some instances (as under the common American bills of lading), the perils of the seas are excepted, and not the acts of the king's enemies. Suppose a carrier-ship should be driven by a storm on an enemy's coast, and she should there be captured by the enemy, before she should be stranded; is this a loss by perils of the sea, or by capture? It seems that it is a loss by capture; for that is the proximate cause.[3] But suppose that she should be first stranded on the coast by the gale, and in consequence thereof should be afterwards captured by the inhabitants? In that case, it seems that it would be deemed a loss, not by capture, but by the perils of the sea, upon the same principle; for the gale is the proximate cause of the stranding.[4]

§ 527. The case of a loss by jettison, made by compulsion of an enemy to gratify his revenge, or from an apprehension (well or ill founded) of danger, would, it is presumed, be deemed an act of the enemy, although done by the immediate agency of the ship's crew or officers.[5]

§ 528. In all cases where the common carrier cannot make out a defence upon some one of the grounds already stated,

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[1] Morse *v.* Slue, 1 Vent. R. 190, 238; s. c. Th. Raym. R. 220; Proprietors of Trent & Mersey Navigation Co. *v.* Wood, 3 Esp. R. 127; s. c. 4 Doug. R. 287; Barclay *v.* Heygena, cited 1 Term R. 33; s. c. under name of Barclay *v.* Cuculla y Gana, 3 Doug. R. 389; Marsh on Insur. B. 1, ch. 7, § 5, p. 242, &c.; Jones on Bailm. 103 to 107; Id. 122; Coggs *v.* Bernard, 2 Ld. Raym. R. 909, 918; Lane *v.* Cotton, 12 Mod. R. 480; Woodleife *v.* Curties, 1 Roll. Abridg. *Action sur Case*, C. pl. 4.

[2] Ante, § 25, 512.

[3] Green *v.* Elmslie, Peake, R. 212; Ante, § 515, and cases there cited.

[4] Hahn *v.* Corbett, 2 Bing. R. 205; Ante, § 515. See also, on this point of proximate and remote cause, Waters *v.* Merchants Louisville Insurance Co. 11 Peters, R. 213, and the cases there cited, and those cited ante, § 515, 517.

[5] Ante, § 515, and cases there cited.

which form exceptions to his liability, he must pay the loss, although there has been no negligence whatsoever on his part.[1] Hence (as we have seen), he is liable for all thefts, robberies, and embezzlements by any of the crew, or by any other persons, although he may have exercised every possible vigilance to prevent the loss.[2] In like manner, he is liable for a loss occasioned by an accidental fire, wholly without any negligence on his part;[3] and by an accident arising from any unseen nuisance in the course of his navigation.[4]

§ 529. In all cases of loss it seems that the *onus probandi* is on the carrier to exempt himself from liability; for *primâ facie*, the law imposes the obligation of safety upon him.[5] It will, therefore, be sufficient *primâ facie* evidence of loss by negligence, that the goods have never been delivered to the bailor or his agent, or to the consignee.[6] [But the burden of proving

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[1] Ante, § 492, 507 *a*; McArthur *v.* Sears, 21 Wend. R. 190.

[2] Abbott on Shipp. P. 3, ch. 3, § 3, 5th edit.; Jones on Bailm. 107, 109, 122; King *v.* Shepherd, 3 Story, R. 356; Proprietors of Trent & Mersey Navig. Co. *v.* Wood, 3 Esp. R. 127; s. c. 4 Doug. R. 287; Barclay *v.* Cuculla y Gana, 3 Doug. R. 389; Schieffelin *v.* Harvey, 6 Johns. R. 170; Watkinson *v.* Laughton, 8 Johns. R. 213; Gibbon *v.* Paynton, 4 Burr. R. 2298; Ante, § 507 *a*.

[3] Forward *v.* Pittard, 1 Term R. 33; Hyde *v.* Trent & Mersey Navig. Co. 5 Term R. 389; Gatliffe *v.* Bourne, 4 Bing. New Cas. 314, 332; Ante, § 507 *a* to 511; Hollister *v.* Nowlen, 19 Wend. R. 234, 246, 248. See American Transportation Co. *v.* Moore, 5 Mich. 368.

[4] Proprietors of Trent & Mersey Navig. Co. *v.* Wood, 3 Esp. R. 127; s. c. 4 Doug. R. 287; Ante, § 517, 518.

[5] Forward *v.* Pittard, 1 Term R. 27, 33; Murphy *v.* Staton, 3 Munf. R. 239; Bell *v.* Reed, 4 Binn. R. 127; Colt *v.* McMechen, 6 Johns. R. 160; Hall *v.* Cheney, 36 N. H. R. 27. See Whalley *v.* Wray, 3 Esp. R. 74; Riley *v.* Horne, 5 Bing. R. 217, 226; Platt *v.* Hibbard, 7 Cowen, R. 500, and note (*a*); The Schooner Emma Johnson, Sprague's Dec. 527; Hastings *v.* Pepper, 11 Pick. R. 41, 43; 2 Kent, Comm. Lect. 40, p. 602, 4th edit.; Ante, § 410; 1 Bell, Comm. p. 463, 464, 5th edit.; 1 Bell, Comm. § 397, 4th edit.; Beckman *v.* Shouse, 5 Rawle, R. 179; Shackleford *v.* Wilcox, 9 Louis. R. 38; Whitesides *v.* Russell, 8 Watts & Sergeant, R. 44; The Huntress, Daveis, C. C. R. 82; King *v.* Shepherd, 3 Story, R. 356; Davidson *v.* Graham, 2 Ohio St. R. (1 Warden), 131. See Lane *v.* Cotton, 1 Salk. R. 143; Ante, § 446; Post, § 573. But see, Muddle *v.* Stride, 9 Carr. & P., N. P. R. 380.

[6] Gilbart *v.* Dale, 5 Adolph. & Ellis, R. 540; Griffiths *v.* Lee, 1 Carr. & P., N. P. R. 110; Cameron *v.* Rich, 4 Strobhart, R. 168; Alden *v.* Pearson, 3 Gray, 342; Clark *v.* Barnwell, 12 How. 272.

such non-delivery is on the plaintiff.[1]] And it seems that the breaking down or overturning of a stage-coach is *primâ facie* evidence of negligence on the part of the proprietor and his servants.[2]

§ 530. In respect to the property carried, it matters not whether it be money, or goods, or other movable merchandise.[3] The carrier is equally responsible for each.[4] But this supposes that the carrier is accustomed to carry money as well as goods on hire, or that it is the known usage of the trade or business to take both; or that the owner has knowingly taken money on hire in the particular case.[5] If it is known that he does not carry money, but goods only, then he will not be liable for money, which is carried without his consent or sanction, and is lost.[6] And if the master or other agent of a carrier-ship or steamboat is prohibited from carrying money for hire on account of the owner, but is allowed to carry it on his own account, or if that is the course of the trade or employment, then the owner will not be responsible for the loss of any money so taken by the master for hire.[7] Therefore, where it is the usage of the owners of steamboats on a particular line not to carry money or bank-bills for hire, if either money or bills are intrusted to the master of one of his boats by persons acquainted with the usage, the owners of the boat will not be liable for any loss thereof.[8] But if the shippers are unacquainted with the usage, it should seem that the owners will

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[1] Woodbury *v.* Frink, 14 Illinois R. 279; Ringgold *v.* Haven, 1 Calif. R. 108. And see Midland Railway Co. *v.* Bromley, 17 C. B. 376.

[2] Christie *v.* Griggs, 2 Camp. R. 79; Stokes *v.* Saltonstall, 13 Peters, R. 181; Ante, § 507 *a*, 511. See Hall *v.* Connect. R. Steamboat Co. 13 Conn. R. 319.

[3] Kemp *v.* Coughtry, 11 Johns. R. 107; Tyly *v.* Morrice, Carth. R. 485; Allen *v.* Sewall, 2 Wend. R. 327; s. c. 6 Wend. R. 337; Ante, § 495.

[4] Ibid.

[5] Allen *v.* Sewall, 2 Wend. R. 327; s. c. 6 Wend. R. 335; Cincinnati Co. *v.* Boal, 15 Ind. R. 346.

[6] See Whitmore *v.* Steamboat Caroline, 20 Missouri, R. 513.

[7] Ibid. Choteau *v.* Steamboat St. Anthony, 16 Missouri, R. 217; s. c. 20 Missouri, R. 519.

[8] Allen *v.* Sewall, 2 Wend. R. 327; s. c. 6 Wend. R. 335; S. P. in the case of The Citizens Bank *v.* Nantucket Steamboat Co. 2 Story, R. 16.

be liable for the loss, as the masters are the general agents of the owners.[1]

§ 530 *a*. In respect to goods in a carrier-vessel, which are shipped to be stowed on deck, as they are, from their situation, peculiarly liable to be thrown overboard to lighten the vessel in cases of distress, if they are necessarily so thrown overboard, the carrier is exonerated, and the owner of the goods must bear the loss, unless so far as he may be entitled to contribution, as in case of a general average.[2] But if such goods are, without the consent of the owner, or a general custom binding him, stowed on deck, and on that account ejected in tempestuous weather, the carrier will be chargeable with the loss.[3]

§ 531. The case of Barcroft, as cited by Lord Chief Justice Rolle, would seem to imply a responsibility of the carrier even in cases of jettison. It is stated thus: "A box of jewels had been delivered to a ferry-man, who knew not what it contained, and a sudden storm arising in the passage, he threw the box into the sea. Yet it was resolved, that he should answer for it."[4] Sir William Jones suspects, that there must have been some proof of culpable negligence in the case, and that probably the casket was both small and light enough to have been kept longer on board than other goods.[5] Even then the case

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[1] Chouteau *v.* Steamboat St. Anthony, 14 Missouri R. 226; s. c. 12 Missouri R. 389; s. c. 16 Missouri R. 216; s. c. 20 Missouri R. 521; Allen *v.* Sewall, 2 Wend. R. 327. The judgment was reversed in error, but under very special circumstances. 2 Kent, Comm. Lect. 40, p. 598, 599, 4th edit.

[2] Smith *v.* Wright, 1 Caines, R. 43; Dodge *v.* Bartol, 5 Greenl. R. 286 (Bennett's ed. p. 245); Cram *v.* Aiken, 13 Maine R. 229; Hampton *v.* Brig Thaddeus, 4 Martin, Louis. R. 582; Lenox *v.* United Insurance Co. 3 Johns. Cas. 178; Abbott on Shipp. P. 3, ch. 8, § 13, 5th edit.; 3 Kent, Comm. Lect. 47, p. 206, 240, 4th edit. See Gould *v.* Oliver, 4 Bing. New Cas. 134; Crosby *v.* Fitch, 12 Conn. R. 410, 419, 420.

[3] Barber *v.* Brace, 3 Conn. R. 9; Smith *v.* Wright, 1 Caines, R. 43, 45; Lenox *v.* United Insurance Co. 3 Johns. Cas. 178; 3 Kent, Comm. Lect. 47, p. 206, 4th edit.; Crane *v.* The Rebecca, Ware, R. 188, 209, 210; s. c. 6 American Jurist, 1. See Ante, § 413 to 413 *d*; Shackleford *v.* Wilcox, 9 Louis. R. 33, 39.

[4] Cited in Kenrig *v.* Eggleston, Aleyn, R. 93; Jones on Bailm. 107, 108; Ante, § 525; Post, § 575.

[5] Jones on Bailm. 107, 108.

would be sufficiently hard; as the ferry-man did not know the contents, and might have acted for the best. But if the doctrine of the case be, that jettison will not, in a clear case of necessity, discharge the carrier, it is not law; for it was expressly decided in Lord Coke's time, in the case of a barge-man, that where goods were thrown overboard in a great storm to save the lives of the passengers by lightening the barge, the bargeman was exonerated; for the storm was the act of God, and the occasion of throwing them overboard.[1]

§ 532. Fourthly. As to the commencement and termination of the risk of common carriers. (1) The commencement of the risk. To render a carrier responsible, there must be an actual delivery to him, or to his servants, or to some other person authorized to act in his behalf; and as soon as such delivery is complete, the responsibility of the carrier as such commences.[2] But it is often a matter of great nicety to decide, upon the circumstances of the case, whether there has been such a delivery or not. Thus, where goods were left in the yard of an inn, where the carrier and other carriers put up, but no actual delivery to the carrier or his servant was proved, it was deemed not a complete delivery to the carrier, so as to charge him with the custody.[3] So where goods were delivered at a wharf to an unknown person there, and no knowledge of the fact was brought home to the wharfinger or his agents, this was held not to be a sufficient delivery to charge him, either as a wharfinger, or as a carrier, with the custody of the goods.[4]

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[1] Cited by Lord Coke in Bird *v.* Astcock, 2 Bulst. R. 280; Jones on Bailm. 108. See also, Gillett *v.* Ellis, 11 Illinois R. 579; Johnston *v.* Crane, 1 Kerr (N. B.), 356; Lawrence *v.* Minturn, 17 Howard, R. 114.

[2] 1 Bell, Comm. p. 464, 5th edit.; 1 Bell, Comm. § 397, 4th edit.; Randleson *v.* Murray, 8 Adolph. & Ellis, R. 109; Ante, § 445; Burrell *v.* North, 2 Carrington & Kirwan, N. P. R. 680; Blanchard *v.* Isaacs, 3 Barbour, Supreme Court (N. Y.), R. 388; Tower *v.* Utica & Schenectady Railroad Co. 7 Hill, R. 47; The Huntress, Daveis, C. C. R. 82; 2 Kent, Comm. Lect. 40, p. 604, 4th edit.

[3] Selway *v.* Holloway, 1 Ld. Raym. R. 46; 1 Bell, Comm. p. 464, 5th edit. 1 Bell, Comm. § 397, 4th edit.

[4] Buckman *v.* Levi, 3 Camp. R. 414. See also, Trowbridge *v.* Chapin, 23 Conn. R. 595; 1 Bell, Comm. p. 464, 5th edit.; 1 Bell, Comm. 397, 4th edit.

And where, by the usage of the business, a delivery of goods on the dock near the carrier-boat (as in the case of a carrier canal-boat) is a good delivery, so as to charge the carrier, it must be understood with this qualification, that due notice is given to him of the fact; for otherwise he will not be chargeable, since, until he has knowledge that the goods are on the dock for the purpose of being carried, he has no right to assume any custody of them.[1] [But if it be the constant usage and practice for a carrier to receive and carry property left at a particular place, without any special notice of such deposit, a delivery at such place will be a sufficient delivery to charge the carrier, although no express notice was given to him or to his agent of such deposit.[2]]

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[1] Packard *v.* Getman, 6 Cowen, R. 757; 2 Kent, Comm. Lect. 40, p. 604, 4th edit. And see Wright *v.* Caldwell, 3 Mich. 51.

[2] [Merriam *v.* Hartford & N. H. Rail. Co. 20 Conn. R. 350. Storrs, J., said: "A contract with a common carrier for the transportation of property being one of bailment, it is necessary, in order to charge him for its loss, that it be delivered to and accepted by him for that purpose. But such acceptance may be either actual or constructive. The general rule is, that it must be delivered into the hands of the carrier himself, or of his servant, or some person authorized by him to receive it; and if it is merely deposited in the yard of an inn, or upon a wharf to which the carrier resorts, or is placed in the carrier's cart, vessel, or carriage, without the knowledge and acceptance of the carrier, his servants or agents, there would be no bailment or delivery of the property, and he consequently, could not be made responsible for its loss. Addison on Cont. 809. But this rule is subject to any conventional arrangement between the parties in regard to the mode of delivery, and prevails only where there is no such arrangement. It is competent for them to make such stipulations on the subject as they see fit; and when made, they, and not the general law, are to govern. If, therefore, they agree that the property may be deposited for transportation at any particular place, and without any express notice to the carrier, such deposit merely would be a sufficient delivery. So if, in this case, the defendants had not agreed to dispense with express notice of the delivery of the property on their dock, actual notice thereof to them would have been necessary; but if there was such an agreement, the deposit of it there, merely, would amount to constructive notice to the defendants, and constitute an acceptance of it by them. And we have no doubt, that the proof by the plaintiff of a constant and habitual practice and usage of the defendants to receive property at their dock for transportation, in the manner in which it was deposited by the plaintiff, and without any special notice of such deposit, was competent, and in this case, sufficient to show a public offer by the defendants, to receive property for that

§ 533. The liability of carriers attaches from the time of their acceptance of the goods, whether that acceptance is in a special manner, or according to the usage of their business.[1] But an acceptance in some way, either actual or constructive, is indispensable.[2] [Thus, where a coat was delivered to the driver of a stage-coach, by a person not a passenger, to be delivered to another in a different place, but nothing was paid for the carriage of the coat, and the driver refused to put it on the

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purpose, in that mode; and that the delivery of it there accordingly, by the plaintiff, in pursuance of such offer, should be deemed a compliance with it on his part; and so to constitute an agreement between the parties, by the terms of which the property, if so deposited, should be considered as delivered to the defendants without any further notice. Such practice and usage were tantamount to an open declaration, a public advertisement by the defendants, that such delivery should, of itself, be deemed an acceptance of it by them, for the purpose of transportation; and to permit them to set up against those who had been thereby induced to omit it, the formality of an express notice, which had thus been waived, would be sanctioning the greatest injustice, and the most palpable fraud.

"The present case is precisely analogous to that of the deposit of a letter for transportation in the letter-box of a post-office, or foreign packet vessel, and to that of a deposit of articles for carriage in the public box provided for that purpose, in one of our express offices; where it would surely not be claimed, that such a delivery would not be complete, without actual notice thereof to the head of these establishments or their agents.

"The only authorities cited by the defendants, to show that an express notice to them was necessary in this case, are Buckman *v.* Levi, 3 Campb. 414, and Packard *v.* Getman, 6 Cowen, 757. These cases are distinguishable from the present in this respect, that there was not, in either of them, a claim of any particular habit or usage of the defendant, which should vary or modify the general principles of law in regard to the mode of delivering the property. They were, therefore, decided merely on those general principles, unaffected by any special agreement between the parties on that subject, inferable from such usage. But in several of the cases cited, it was held, that where the carrier had been in the habit of receiving property for transportation in a particular mode, a delivery to him in that mode, was sufficient."]

[1] Dale *v.* Hall, 4 Wils. R. 281; Boehm *v.* Combe, 2 Maule & Selw. R. 172; 2 Kent, Comm. Lect. 40, p. 604, 4th edit.; Lakeman *v.* Grinnell, 5 Bosworth, 625.

[2] Abbott on Shipp. P. 3, ch. 3, § 2, 5th edit.; Ante, § 445 to 449, 451 to 453; Packard *v.* Getman, 6 Cowen, R. 757; 1 Bell, Comm. 464, 5th edit.; 1 Bell, Comm. § 397, 4th edit.

way-bill, saying he had no right to do so; and there was no proof that the coat ever came to the possession of the proprietor of the stage-coach, or any of his agents, except the driver, it was held that there was no delivery of the coat to such proprietor, and that he was not responsible as a common carrier for the loss thereof.[1]] And where goods are actually put into the wagon or barge of a carrier, he will not be chargeable, if it appears that there is no intention to trust him with the custody; as if the owner is uniformly in the habit of placing his own servant on board as a guard, who exclusively takes upon himself the management and custody of them.[2] But the mere fact, that the owner or his servant goes with the goods, if the other circumstances of the case do not exclude the custody of the carrier, will not of itself exempt him from responsibility.[3]

§ 534. It is in many cases the usage of the masters and owners of ships to receive goods on the quay, or beach, or in their boats, or at the wharf, or the warehouse of the shipper or his agent; or to take them, at other special places, into the custody of the mate or other proper officer of the ship. In all such cases their liability as carriers commences at the instant of such acceptance of the goods.[4]

§ 535. It sometimes happens, that a party is at once a warehouse-man or an innkeeper, and a carrier, and that after a receipt of the goods, and before their being put *in itinere*, they are lost or destroyed. In such cases the question often arises; whether the receiver is liable in the one capacity or another; for the responsibility of each (as we have seen) is not, or at

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[1] Blanchard *v.* Isaacs, 3 Barbour, Supreme Ct. (N. Y.), R. 388.

[2] East India Company *v.* Pullen, 2 Str. R. 690; Robinson *v.* Dunmore, 2 Bos. & Pull. R. 419; Schieffelin *v.* Harvey, 6 Johns. R. 170; Marshall, Insurance, B. 1, ch. 6, § 5, p. 252, &c.; Rucker *v.* London Assurance Co. Ibid.; Post, § 578. See White *v.* Winnisimmet Co. 7 Cush. R. 156.

[3] Abbott on Shipp. P. 3, ch. 3, § 3, 5th edit.; Cobban *v.* Downe, 5 Esp. R. 41; Marshall, Insurance, B. 1, ch. 7, § 5, p. 252, &c.; 1 Bell, Comm. p. 464, 5th edit.; 1 Bell, Comm. § 397, 4th edit. See Brind *v.* Dale, 2 Mees. & Welsb. R. 775; Hollister *v.* Nowlen, 19 Wend. R. 234; Post, § 578.

[4] Robinson *v.* Dunmore, 2 Bos. & Pull. R. 419; Marshall, Insurance, B. 1, ch. 1, § 5, p. 252, &c.; Abbott on Shipp. P. 3, ch. 3, § 3, 5th edit.; Ante, § 414 to 449, 451 to 453; Fitchburg Railroad *v.* Hanna, 6 Gray, 539.

least may not be, coextensive.[1] In a case which has been already under notice in another place,[2] where goods were received by a wharfinger, for the purpose of being shipped from London to Newcastle, and the wharfinger was at the same time a lighterman, whose duty it was to convey the goods from the wharf in his own lighter to the vessel in the river, and the goods, while on the premises, were accidentally destroyed by fire, Lord Ellenborough is reported to have held, that, while the wharfinger was in possession of these goods, his liability was similar to that of a carrier.[3] The case, however, went off upon another ground; and in another report of the same case[4] the dictum is not even alluded to. The doctrine at all events seems to be utterly untenable upon principle.[5]

§ 536. In all such cases the material point upon which the controversy hinges, is, whether the one character, or the other, predominates in the particular stage of the transaction.[6] If a common carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage, and for the purpose of facilitating it, his liability as a carrier begins with the receipt of the goods.[7] So, if an innkeeper is at the same time a carrier, and goods are sent to his inn, and received by him for transportation, he is liable, as a carrier, for any loss, before they are put upon their transit.[8]

§ 537. On the other hand, if a person is at the same time a common carrier and a forwarding merchant, and he receives

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[1] 1 Bell, Comm. p. 469, 5th edit.; 1 Bell, Comm. § 403, 4th edit.; Ante, § 444, 446 to 449, 487, 528; Post, § 538.

[2] Ante, § 451.

[3] Maving *v.* Todd, 1 Stark. R. 72.

[4] Maving *v.* Todd, 4 Camp. R. 225; Ante, § 451.

[5] Ante, § 451, 452.

[6] Ante, § 444 to 449.

[7] Forward *v.* Pittard, 1 Term R. 27; Ante, § 446; Moses *v.* The Boston & Maine Railroad Co. 4 Foster, R. 71; Clark *v.* Needles, 25 Penn. St. Rep. 338; Blossom *v.* Griffin, 3 Kernan, 569.

[8] Buller, J., in Hyde *v.* Trent and Mersey Navigation Co. 5 Term. R. 389; 1 Bell, Comm. p. 469, 5th edit.; 1 Bell, Comm. § 403, 4th edit.; Ante, § 444, 446 to 449, 451 to 453. See Cairns *v.* Robins, 8 Mees. & Welsb. R. 258.

goods into his warehouse to be forwarded, according to the future orders of the owners; if the goods are lost by fire before such orders are received, or the goods are put in transit, he is not chargeable as a common carrier, but only as a warehouse-man.[1]

§ 538. (2) The termination of the carrier's risk. As soon as the goods have arrived at their proper place of destination, and are deposited there, and no further duty[2] remains to be done by the carrier, his responsibility as such ceases.[3] We have already had occasion to consider some cases illustrative of this doctrine under another head.[4] If a carrier between A and B receives goods to be carried from A to B, and thence to be forwarded by a distinct conveyance to C; as soon as he arrives with the goods at B, and deposits them in his warehouse there, his responsibility as carrier ceases; for that is the terminus of his duty as such. He then becomes, as to the goods, a mere warehouse-man, undertaking for their further transportation.[5] [Where a carrier receives goods to be delivered to a subsequent carrier for transportation, and the latter, upon request, refuses

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[1] Platt *v.* Hibbard, 7 Cowen, R. 497; Roskell *v.* Waterhouse, 2 Stark. R. 461; Ackley *v.* Kellogg, 8 Cowen, R. 223; Ante, § 444 to 449, 451 to 453. See Maybin *v.* South Carolina Railroad Co. 8 Rich. R. 241; 1 Bell, Comm. p. 469, 5th edit.; 1 Bell, Comm. § 403, 4th edit.

[2] [In a recent case it was held to be a carrier's duty, if the consignee refuses to pay the carriage, to retain the goods at his place of destination for a reasonable time, and during that time to await any directions from the consignor, and if not received to communicate with him; and if returned to the consignor before a reasonable time, and it is lost, the consignor may maintain trover for the goods. Crouch *v.* Great Western Railway Co. 2 Hurl. & Norm. 491: affirmed on appeal, 3 Hurl. & Norm. 183. But in another case it was said not to be an absolute rule of law, that the carrier should always give a consignor notice that the goods were refused by the consignee, he is bound to do only what is reasonable, to be determined by the jury upon the circumstances of each particular case. Hudson *v.* Baxendale, 2 Hurl. & Norm. 575.]

[3] Ante, § 445 to 453; Post, § 546, 547, 548; 2 Kent, Comm. Lect. 40, p. 604, 605, 4th edit. See Crouch *v.* Great Western Railway, 2 Hurl. & Norm. 491; 3 Id. 183; McCarty *v.* N. Y. & Erie Railroad, 6 Casey, 247.

[4] Ante, § 445 to 449, 451 to 453.

[5] Garside *v.* Trent and Mersey Navigation Company, 4 Term R. 581; Ackley *v.* Kellogg, 8 Cowen, R. 223; Ante, § 446–449, 451 to 453; Post, § 546, 547, 548. See St. John *v.* Van Santvoord, 25 Wend. R. 660; Post, § 542.

or neglects to receive them, for an unreasonable time, the first carrier still remains liable as an insurer, and in order to exonerate himself, he should store the goods in a warehouse, when there is opportunity to do so, or should in some way clearly indicate his renunciation of the relation of a carrier. Thus, where a carrier on the Hudson River received goods at New York city, to be transported by him to Albany, thence over another line to Brockport, N. Y.; and the latter, after promising to receive them, neglected to do so, by reason of which the goods were placed by the first carrier in a floating barge, as a place of temporary storage, and to facilitate transshipment, when they were consumed by fire, the first carrier was held liable for their loss, though without his actual fault.[1]] But if a common carrier between A and B receives goods at A, directed to a place beyond B, as for example to a place called C, without limiting his responsibility to the mere carriage from A to B, so that it may be fairly inferred from the circumstances, that he undertakes to deliver them at C, he will be liable for any loss thereof between B and C, even when carried by the usual mode of transportation, unless, indeed, by the known usage of the trade, the responsibility as carrier is limited to the arrival of the goods at B, and the usage is known to the bailor.[2] [But the American rule probably is that if the carrier receiving the goods has no connection in business with another line, and receives pay for transportation only on his own road, he is not liable, in the absence of any special contract, for a loss

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[1] Goold *v.* Chapin, 6 Smith (20 N. Y.), R. 259. And see Miller *v.* Steam Navigation Co. 6 Selden, 431.

[2] St. John *v.* Van Santvoord, 25 Wend. R. 660. [But this case was afterwards reversed, 6 Hill, R. 157. See Muschamp *v.* Lancaster and Preston Railway Co. 8 Mees. & Welsb. R. 421; Watson *v.* Ambergate, Nottingham, &c., Railway Co. 3 Eng. Law and Eq. R. 497; Scotthorn *v.* South Staffordshire Railway Co. 18 Eng. Law and Eq. R. 553; s. c. 8 Exch. R. 341; Wilson *v.* York, Newcastle, & Berwick Railway Co. 18 Eng. Law and Eq. R. 557; Crouch *v.* London & Northwestern Railway, 14 C. B. 255; Wilby *v.* West Cornwall Railway Co. 2 Hurl. & Norm. 703; Illinois Central R. R. *v.* Copeland, 24 Ill. R. 337; Western Transportation Co. *v.* Newhall, 24 Ill. 466; Noyes *v.* Rutland & B. Railroad Co. 1 Wms. (Vt.), 110; Wilcox *v.* Parmelee, 3 Sandf. R. 610.]

beyond his own line;[1] and the simple receipt of goods directed

[1] [Nutting *v.* Conn. River Railroad Co. 1 Gray, 502; Quimby *v.* Vanderbilt, 17 N. Y. R. 313. In the first case Metcalf, J., said: "On the facts of this case, we are of opinion that there must be judgment for the defendants. Springfield is the southern terminus of their road; and no connection in business is shown between them and any other railroad company. When they carry goods that are destined beyond that terminus, they take pay only for the transportation over their own road. What, then, is the obligation imposed on them by law, in the absence of any special contract by them, when they receive goods at their depot in Northampton, which are marked with the names of consignees in the city of New York? In our judgment, that obligation is nothing more than to transport the goods safely to the end of their road, and there deliver them to the proper carriers, to be forwarded toward their ultimate destination. This the defendants did, in the present case, and in so doing performed their full legal duty. If they can be held liable for a loss that happens on any railroad besides their own, we know not what is the limit of their liability. If they are liable in this case, we do not see why they would not also be liable, if the boxes had been marked to consignees in Chicago, and had been lost between that place and Detroit, on a road with which they had no more connection than they have with any railway in Europe.

"But the plaintiff seeks to charge the defendants on the receipt given by Clarke, their agent, as on a special contract that the boxes should be safely carried the whole distance between Northampton and New York. We cannot so construe the receipt. It merely states the fact, that the boxes had been received 'for transportation to New York.' And the plaintiff might have proved that fact, with the same legal consequences to the defendants, by oral testimony, if he had not taken a receipt. That receipt, in our opinion, imposed on the defendants no further obligation, than the law imposed without it.

"The plaintiff's counsel relied on the case of Muschamp *v.* Lancaster & Preston Junction Railway, 8 M. & W. 421, in which it was decided by the Court of Exchequer, that when a railway company take into their care a parcel directed to a particular place, and do not by positive agreement limit their responsibility to a part only of the distance, that is *primâ facie* evidence of an undertaking to carry the parcel to the place to which it is directed, although that place be beyond the limits within which the company, in general, profess to carry on their business of carriers. And two Justices of the Queen's Bench subsequently made a like decision. Watson *v.* Ambergate, Nottingham, & Boston Railway, 3 Eng. Law and Eq. R. 497. We cannot concur in that view of the law; and we are sustained in our dissent from it, by the Court of Errors in New York, and by the Supreme Courts of Vermont and Connecticut. Van Santvoord *v.* St. Johns, 6 Hill, 157; Farmers & Mechanics Bank *v.* Champlain Transportation Company, 18 Verm. 140, and 23 Verm. 209; Hood *v.* New York & New Haven Railroad, 22 Conn. 1. In these cases, the decision

to a place beyond the carrier's own line does not, *primâ facie*, create a contract to carry such goods to their final destination.[1] Perhaps the apparent discrepancy between the English and American decisions is only as to what facts constitute an implied contract on the part of a carrier to carry goods to their ultimate destination, although beyond his own route.[2] In a recent case the plaintiff delivered at the station of the Great Western Railway company at Bath, a van load of furniture to be conveyed to Torquay. He signed a receipt note headed "Bath Station, To the Great Western Railway Company. Receive the undermentioned goods on the conditions stated on the other side, to be sent to Torquay station and delivered to the plaintiff or his agent." One of the said conditions was that the company would not be responsible to loss or damage to his goods beyond the limits of their railway; another was, that the company would not be answerable for loss by fire. The van was placed on a truck and conveyed to Bristol, where the Great Western line ends, and the Bristol and Exeter line begins, which itself terminates at Exeter, where it is joined by the line of the South Devon Company, which runs to Torquay, where the goods were to be sent. The van and furniture arrived safely at Exeter, but while in the station there, belonging to the Bristol and Exeter Railway, they were accidentally destroyed by fire. It was held in the Exchequer chamber, reversing the judgment in the Court of Exchequer, that the Great Western Railway Company received the goods to be carried on their line, subject to the stipulation against loss by fire, and that they discharged themselves by forwarding the goods to be carried by the Bristol and Exeter Railway Company, and there being no evidence as

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in Weed *v.* Saratoga & Schenectady Railroad, 19 Wend. 534 (which was cited by the present plaintiff's counsel), was said to be distinguishable from such a case as this, and to be reconcilable with the rule, that each carrier is bound only to the end of his route, unless he makes a special contract that binds him further."]

[1] [See Fleming *v.* Mills, 5 Mich. 420; Elmore *v.* Naugatuck Railway, 23 Conn. 457; Jenneson *v.* The Camden & Amboy Railroad Co. in the District Court of Philadelphia, Jan. 1856, 4 Am. Law Reg. 234, Feb. 1856; Angle *v.* Mississippi Railway, 9 Iowa R. 493; Carter *v.* Peck, 4 Sneed (Tenn.), 203.]

[2] See Wilby *v.* West Cornwall Railway, 2 Hurl. & Norm. 703.

to the terms on which they received them, they must be deemed to have received them as common carriers, and were consequently liable for their loss.[1] But this decision was reversed in the House of Lords, on the ground that the contract was an entire one with the Great Western Company, through the whole route, and for this reason, that the Bristol and Exeter Railway Company were not liable.[2] And the principle that the first carrier is responsible for a loss throughout the entire route, although beyond its own line, will, in some cases at least, exonerate the company on whose particular line the loss occurred. Thus, in a recent case, M. took a ticket at the Newport ticket-station of the South Wales Railway Company, from Newport to Birmingham, for which he there paid the entire fare. The South Wales Railway extends to a point within a few miles of Gloucester, where it meets the line of the Great Western Railway Company, and the Midland Railway Company have a line from Gloucester to Birmingham. The South Wales Railway Company had an arrangement with the Great Western Railway Company and the Midland Railway Company, to issue tickets and convey passengers the entire distance. M. delivered his portmanteau to a porter of the South Wales Railway Company at Newport, who placed on it a ticket marked, "S. W. R. via Midland from Gloucester, Newport to Birmingham," and M. arrived with his portmanteau at Gloucester. He then took his portmanteau from the South Wales Railway carriage, and delivered it to the guard of the Midland Railway Company. On his arrival at Birmingham the portmanteau was missing, but was ultimately found in a street in Birmingham broken open, and part of its contents gone. It was held, that on these facts there was no contract between M. and the Midland Railway Company (the last line) but that there was an entire contract between M. and the South Wales Railway Company to convey M. the whole distance from New-

[1] Collins *v.* Bristol and Exeter Railway Co., 1 Hurl. & Norm. 517, reversing the same case in 11 Exch. 790.

[2] Bristol & Exeter Railway Co. *v.* Collins, 7 House of Lords' Cases, 194; 5 Hurl. & Norm. 969.

port to Birmingham, and that M. could maintain no action against the Midland Railway Company.[1]]

§ 539. The like result will follow, if the goods are destined to B. only, if it is not, by the custom of the business, the carrier's duty to deliver the goods to the consignees there, but simply to deposit them in his warehouse.[2] But if it is his duty to deliver the goods to the consignees at B., then his liability as carrier does not cease by such a deposit; but he is chargeable for any loss which occurs, until an actual delivery to the party.[3] So, he is chargeable, in like manner, for any loss during a deposit in any warehouse at an intermediate state of the journey between A and B.[4] [And a stipulation in the bill of lading, that, in case of low-water, he may transship the goods in other craft than his own, does not discharge him from any liability incident to his contract, until they are delivered at the destined port.[5]]

§ 540. And if, notwithstanding any custom to the contrary, the carrier specially undertakes to deliver the goods to the owner, he is chargeable for any loss before such delivery, although in all respects, he has followed the general custom of the place.[6]

§ 541. On the other hand, however universal the custom may be, to deliver the goods to the owner at the place of destination, still the parties may, by their contract, waive it; and if

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[1] Mytton *v.* Midland Railway Co. 4 Hurl. & Norm. 614. See also, Coxon *v.* Great Western Railway Co. 5 Hurl. & Norm. 274; Bristol & Exeter Railway Co. *v.* Collins, 7 House of Lords' Cases, 194; 5 Hurl. & Norm. 969.

[2] *In re* Webb, 8 Taunt. R. 443; s. c. 2 Moore, R. 500; 2 Kent, Comm. Lect. 40, p. 604, 605, 4th edit.; Cairns *v.* Robins, 8 Mees. & Welsb. 258; Ante, § 446 to 449, 453; Thomas *v.* Boston and Providence Railroad Co. 10 Metcalf, R. 472.

[3] Hyde *v.* Trent & Mersey Nav. Co. 5 Term R. 389; Golding *v.* Manning, 3 Wils. R. 429; s. c. 2 Black. R. 916; Catley *v.* Wintringham, Peake, R. 150; 2 Kent, Comm. Lect. 40, p. 604, 605, 4th edit.; Ante, § 446 to 449; Bourne *v.* Gatliff, 11 Clark & Finnelly, R. 45; Whitesell *v.* Russell, 8 Watts & Sergeant, R. 44.

[4] Ibid.; Ante, § 446 to 449, 453. And see Miller *v.* The Steam Navigation Co. 13 Barb. R. 362; Goold *v.* Chapin, 10 Barb. R. 612.

[5] Whitesell *v.* Russell, 8 Watts & Sergeant, R. 44.

[6] Wardell *v.* Mourillyan, 2 Esp. R. 693.

they do, the carrier is discharged.[1] As if the owner, after the arrival of the goods, requests the carrier to let them remain in his warehouse, until the owner can conveniently send for them; and they are there deposited, and are afterwards destroyed by fire; the duty of the carrier being at an end, he is not responsible for the loss in that character.[2] So, if a man, having no warehouse of his own, directs the carrier to leave his goods at the wagon-office, until he should find it convenient to remove or sell them, the carrier's responsibility will terminate with the deposit.[3] But mere interference by the owner, in giving directions as to the care of his property, the transportation of which is interrupted by the closing of a river, is not an acceptance of the property, or a waiver of further responsibility of the carrier, although it may, under certain circumstances, be evidence thereof.[4]

[§ 541 *a*. The place and manner of delivery may always be varied, with the assent of the owner of the property; and if he interferes to control or direct in the matter, he assumes the responsibility. Therefore, where the agent of a party, who owned a block of marble transported on a railroad, requested the agent of the company to permit the car which contained the marble to be hauled to the depot of a neighboring railroad company, and such agent assented thereto, and assisted in hauling the car to the depot, and the agent of the owner there requested and obtained leave of that company to use its machinery to remove the marble from the car; it was held

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[1] Strong *v.* Natally, 1 Bos. & Pull. N. R. 16; Marshall, Insur. B. 1, ch. 7, § 5, p. 252, &c.; Sparrow *v.* Caruthers, 2 Str. R. 1236; Bowman *v.* Teall, 23 Wend. R. 306; Stone *v.* Waitt, 31 Maine R. 412.

[2] *In re* Webb, 8 Taunt. R. 443; s. c. 2 Moore, R. 500; Ante, § 446 to 449, 453, 528, 532 to 540; Post, § 578; Parsons *v.* Hardy, 14 Wend. R. 215.

[3] Richardson *v.* Goss, 3 Bos. & Pull. R. 119; Scott *v.* Pettit, 3 Bos. & Pull. R. 472; Dixon *v.* Baldwin, 5 East, R. 181; Rowe *v.* Pickford, 8 Taunt. R. 83; s. c. 1 Moore, R. 526; Allan *v.* Gripper, 2 Cromp. & Jerv. R. 218; s. c. 2 Tyrw. R. 217; Abbott on Shipp. P. 3, ch. 9, § 12, 5th edit.; Ante, § 446 to 449, 453; Post, § 578.

[4] Bowman *v.* Teall, 23 Wend. R. 306; Parsons *v.* Hardy, 14 Wend. R. 215; Ante, § 269; Todd *v.* Figley, 7 Watts, R. 542. See Merwin *v.* Butler, 17 Connect. R. 188; Post, § 549 *a*.

that the company that transported the marble was not answerable for the want of care or skill in the persons employed in removing it from the car, nor for the want of strength in the machinery used for this purpose, and could not be charged with any loss that might happen in the course of such delivery.[1] So where the consignee of a package of bank-bills directed the carrier to deliver the same to his agent in another part of the city, which was done, and the property was subsequently stolen from him, it was held that the carrier was not liable to the *consignor*, although the money belonged to him, for the direction of the consignee so to deliver it was sufficient.[2]]

§ 542. In all cases of this sort, the material consideration is, whether the owner of the goods has taken any exclusive possession of them, or has terminated the custody of the carrier by any act or direction, which does not flow from the duty of the carrier.[3] So long as the carrier retains the possession of the goods, or is to perform any further duty, either by custom or contract, as carrier, he is responsible for their safety. But when the transit is ended, and the delivery is either completed, or waived by the owner, then the responsibility of the carrier ceases.[4] So, if the goods, after their arrival, are put on board of a lighter in the customary way, and the owner then takes an exclusive custody of them before they are landed, the carrier is discharged from any subsequent loss.[5]

§ 543. A question often arises in practice, whether the carrier is bound to make personal delivery of the goods to the owner or not: for if he is, then his responsibility as such carrier continues, until the delivery is complete.[6] This may admit of different answers, according to circumstances. [In

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[1] Lewis *v.* Western Railroad Co. 11 Metcalf, R. 509.

[2] Sweet *v.* Barney, 23 Smith (N. Y.), 1335. See Marhall *v.* American Express Co. 7 Wisconsin, R. 1.

[3] Ante, § 444 to 449, 541; Bowman *v.* Teall, 23 Wend. R. 306.

[4] Marsh. on Insur. B. 1, ch. 7, § 5, p. 252, &c.; Abbott on Shipp. P. 3, ch. 3, § 12, 5th edit.; Ante, § 444, 446, 449, 453, 541.

[5] Strong *v.* Natally; 1 Bos. & Pull. N. R. 16; Abbott on Shipp. P. 3, ch. 3, § 12, 5th edit. Stone *v.* Waitt, 31 Maine, R. 412. See St. John *v.* Van Santvoord, 25 Wend. R. 660; Ante, § 538.

[6] Gatliffe *v.* Bourne, 4 Bing. New Cas. 314, 330, 331, 332.

cases of railroad carriers it has been distinctly held not a part of their duty to make a personal delivery in the absence of any usage, or special contract to the contrary.[1]] The manner of delivering the goods, and consequently the period at which the responsibility of the carrier will cease, may, in many instances, depend upon the custom of particular places, and the usage of particular trades, or upon a special contract between the parties. If there is any special contract between the parties, or any local custom or usage of trade on the subject, that will govern; the former as an express, and the latter as an implied term in the contract,[2] upon the plain reason of the maxim: *In contractibus tacite veniunt ea, quæ sunt moris et consuetudinus.*[3] But in the absence of any special contract, or custom, or usage, probably no general rule can be laid down. There seems a strong inclination of opinion (although there has been some diversity of judicial opinion), to hold, that, in cases of transportation by land, the carrier is bound, generally, to make a personal delivery to the owner, unless there is some custom of trade, or some contract to the contrary.[4] Lord Kenyon was strenuously the other way; but the other three Judges, on that occasion, differed from him.[5] On more recent occasions, the opinions of other distinguished Judges have settled down in favor of the doctrine of the three Judges against him.[6] How-

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[1] [Michigan Central Railroad Co. *v.* Ward, 2 Mich. R. 538; Michigan Railroad *v.* Bivens, 13 Ind. R. 263; New Albany Railroad *v.* Campbell, 12 Ind. R. 55. See Michigan Central Railroad *v.* Hale, 6 Mich. 244; Norway Plains Co. *v.* Boston and Maine R. R. Co. 1 Gray, R. 263.]

[2] Hyde *v.* Trent & M. Navigation Co. 5 Term. R. 389; Catley *v.* Wintringham, Peake, R. 150; Golden *v.* Manning, 3 Wils. R. 429; Wardell *v.* Mourillyan, 2 Esp. R. 693; *In re* Webb, 8 Taunt. R. 443; Abbott on Shipp. P. 3, ch. 3, § 12, 5th edit.; Gatliffe *v.* Bourne, 4 Bing. New Cas. 314, 329; Cope *v.* Cordova, 1 Rawle, R. 203; 1 Valin, Comm. 636; Ostrander *v.* Brown, 15 Johns. R. 39; Gibson *v.* Culver, 17 Wend. R. 305, 311. Huston *v.* Peters, 1 Met. (Ky.), 562.

[3] Ante, § 384; Pothier, Contrat de Louage, n. 57.

[4] 2 Kent, Comm. Lect. 40, p. 604, 605, 4th edit.; Gibson *v.* Culver, 17 Wend. R. 305, 306. See Merwin *v.* Butler, 17 Connect. R. 138; Graff *v.* Bloomer, 9 Barr. (Penn.) R. 144.

[5] Hyde *v.* Trent Navigation Co. 5 Term R. 389; 2 Kent, Comm. Lect. 40, p. 604, 605, 4th edit.

[6] Duff *v.* Budd, 3 Brod. & Bing. R. 177; s. c. Moore, R. 469; Bodenham *v.*

ever this may be, it seems clear, that carriers are bound to give notice of the arrival of the goods to the persons to whom they are directed,[1] if they are known to them, and within a reasonable time,[2] unless, indeed, there is a very clear and uniform usage or custom to leave them at a particular place of deposit, where the carrier is accustomed to stop, at the risk of the owner of the goods, without giving him any notice; and he is bound to apply for and receive them there.[3] [For such a usage known to the consignor, has been held a sufficient excuse for non-delivery to the consignee.][4] They must also take care, at their peril, that the goods are delivered to the right person; for otherwise, they will become responsible.[5] [But where goods

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Bennett, 4 Price, R. 34; Birkett *v.* Willan, 2 Barn. & Ald. 356; Garnett *v.* Willan, 5 Barn. & Ald. R. 58; Storr *v.* Crowley, 1 McClel. & Younge, R. 129, 138; Stephenson *v.* Hart, 4 Bing. R. 476; 2 Kent, Comm. Lect. 40, p. 604, 605, 4th edit.

[1] [But see Norway Plains Co. *v.* Boston & Maine Railroad, 1 Gray, R. 263, that this rule does not apply to carriers by railroad: "It was argued," said the Court, "in the present case, that the railroad company are responsible as common carriers of goods, until they have given notice to consignees, of the arrival of goods. The Court are strongly inclined to the opinion, that in regard to the transportation of goods by railroad, as the business is generally conducted in this country, this rule does not apply. The immediate and safe storage of the goods on arrival, in warehouses provided by the railroad company, and without additional expense, seems to be a substitute better adapted to the convenience of both parties. The arrivals of goods, at the larger places to which goods are thus sent, are so numerous, frequent, and various in kind, that it would be nearly impossible to send special notice to each consignee, of each parcel of goods or single article forwarded by the trains."]

[2] Post, § 544; Gatliffe *v.* Bourne, 4 Bing. New Cas. 314, 330, 331; s. c. in error, 3 Mann. & Grang. R. 642, 690. See Granger *v.* Dacre, 12 Mees. & Welsb. R. 431; Nettles *v.* South Carolina R. R. Co. 7 Rich. R. 190; Rome Railroad Co. *v.* Sullivan, 14 Georgia R. 277; Michigan Central Railroad Co. *v.* Ward, 2 Mich. R. 538; Price *v.* Powell, 3 Comst. R. 322; Crawford *v.* Clark, 15 Ill. R. 561; Sultana *v.* Chapman, 5 Wisc. R. 454.

[3] Gibson *v.* Culver, 17 Wend. R. 305, 306. See Eagle *v.* White, 6 Whart. R. 505; Thomas *v.* Boston and Providence Railroad Co. 10 Metcalf, R. 472; Ante, § 446.

[4] Farmers, &c., Bank *v.* Champlain Transportation Co. 16 Verm. R. 52. And the same Court held in the same case in 18 Verm. R. 131, that knowledge of such usage in the consignor was entirely immaterial. But see Price *v.* Powell, 3 Comst. R. 322.

[5] Golden *v.* Manning, 3 Wils. R. 429; Garnett *v.* Willan, 5 Barn. & Ald. R. 58; Storr *v.* Crowley, 1 McClel. & Younge, R. 129, 135, 137; Post, § 545 *b*.

are safely conveyed to the place of destination, and the consignee is dead or absent, or refuses to receive them, or is not known, and cannot after reasonable efforts be found, the carrier may discharge himself from further responsibility, by placing them in store with some responsible third person at that place, for and on account of the owner.[1]]

§ 544. It was said in one case by Mr. Justice Buller, that, when goods are brought into England from foreign countries, they are brought under a bill of lading, which is merely an undertaking to carry them from port to port. A ship trading from one port to another, has not the means of carrying goods on land; and therefore, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier.[2] But this language must be understood with the reasonable limitation and qualification, that due and reasonable notice thereof is given to the consignee.[3] Where, however, the consignee of goods requires the goods to be delivered to himself on board of the ship, and directs them not to be landed on a wharf, it seems that the master must obey the request; for the wharfinger has no right to insist upon the goods being landed at his wharf, although the vessel be moored against it.[4]

§ 545. In America, the rule adopted in regard to foreign voyages, although it has been matter of some controversy, seems to be, that in such cases the carrier is not bound to make a personal delivery of the goods to the consignee; but it will be sufficient, that he lands them at the usual wharf or proper place of landing, and gives due and reasonable notice thereof to the consignee.[5] The latter is, under such circumstances, after such notice, bound to prove suitable persons to

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[1] Fisk *v.* Newton, 1 Denio, R. 45. And see Smith *v.* Nashua & Lowell Railroad, 7 Foster, R. 93; Clendaniel *v.* Tuckerman, 17 Barb. R. 184.

[2] Hyde *v.* Trent & Mersey Nav. Co. 5 Term R. 389; Abbott on Shipp. P. 3, ch. 3, § 12, 5th edit.; 2 Kent, Comm. Lect. 40, p. 604, 605, 4th edit.; Ante, § 446 to 449, 451 to 453, 535 to 537.

[3] Gatliffe *v.* Bourne, 4 Bing. New Cas. 314, 330, 331.

[4] Syeds *v.* Hay, 4 T. R. 260; Abbott on Shipp. P. 3, ch. 3, § 12, 5th edit.

[5] 2 Kent, Comm. Lect. 40, p. 604, 605, and note (c), 4th edit.

take care of the same, and to carry them away.[1] The general usage seems, also, to be in conformity to this rule. But it is of the very essence of the rule, that due and reasonable notice should be given to the consignee, before or at the time of the landing, and that he should have a fair opportunity of providing suitable means to take care of the goods, and to carry them away.[2] And the carrier does not, by sending the goods to the consignee by a carman, without the orders of the consignee, discharge himself from responsibility, even though it is a common practice.[3] If the consignee is unable or refuses to receive the goods, the carrier is not at liberty to leave them on the wharf; but it is his duty to take care of them for the owner.[4]

§ 545 *a*. In this connection, it may be proper to dispose of another point of great practical importance; and that is, at what time the carrier is bound to make a delivery of the goods. The general answer is, that unless exonerated by a special contract,[5] he is bound to deliver the goods within a reasonable time; and that reasonable time must depend upon the circumstances of each particular case. If goods are shipped for a voyage by sea, then the delivery is to be within a reasonable time after the arrival of the carrier-ship; and there is an implied undertaking to speed the ship with reasonable diligence on the voyage.[6] If goods are to be transported by land from

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[1] Chickering *v.* Fowler, 4 Pick. R. 371; Cope *v.* Cordova, 1 Rawle, R. 203; Kohn *v.* Packard, 3 Miller, Louis. R. 225.

[2] Ostrander *v.* Brown, 15 Johns. R. 39: Kohn *v.* Packard, 3 Miller, Louis. R. 225; Pickett *v.* Downer, 4 Verm. R. 21; Gatliffe *v.* Bourne, 4 Bing. New Cas. 314, 330, 331, 332.

[3] Ostrander *v.* Brown, 15 Johns. R. 39; 2 Kent, Comm. Lect. 40, p. 604, 605, and note, 4th edit.; Dean *v.* Vaccaro, 2 Head (Tenn.), 488.

[4] Ibid.; Mayell *v.* Potter, 2 Johns. Cas. 371; Stephenson *v.* Hart, 4 Bing. R. 476; Chickering *v.* Fowler, 4 Pick. R. 371; Cope *v.* Cordova, 1 Rawle, R. 203; Crawford *v.* Clark, 15 Ill. R. 561.

[5] Hughes *v.* Great Western Railway Co. 25 Eng. Law & Eq. R. 347; 14 Com. B. 637; The York, Newcastle, and Berwick Railway Co. *v.* Crisp, 25 Eng. Law & Eq. R. 396; 14 Com. B. 527.

[6] Hand *v.* Baynes, 4 Wharton, R. 204, 210; Parsons *v.* Hardy, 14 Wend. R. 215; Bowman *v.* Teall, 23 Wend. R. 306.

one place to another, then the goods are to be put upon their transit, and forwarded within a reasonable time, and delivered in the usual time after their arrival. Hence it is, that if, by reason of any accident or misfortune, not amounting to an inevitable casualty, or the act of God, or the act of the public enemy [such as the accumulation of an extraordinary amount of freight beyond the capacity of the carrier's means to convey,[1] or a heavy snow storm,[2]] the goods are retarded or obstructed in their transportation, the carrier will not be responsible for damages occasioned by such delay, if he has used due and reasonable diligence in the transportation.[3] If, for example, goods are to be transported by a canal from one place to another, and by reason of ice the canal-boat is retarded, or obstructed, or stopped altogether in her passage, the carrier will not be liable for any loss to the shipper occasioned thereby, if he has used reasonable diligence;[4] [unless there was an express contract to deliver by a certain time.[5]] Such an accident may, indeed, if unavoidable, properly be deemed to be the act of God.[6] But suppose the canal-boat has been retarded or obstructed by the giving way of some lock, or by the rupture and letting off of the water in some part of the canal, or by running against a scow, and being compelled to stop to make repairs, so that she has lost her usual trip, or the trip for the season; in such a case, the carrier will not be liable for any damages or losses occasioned to the shippers thereby, if the goods finally arrive in safety, unless he is guilty of some neg-

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[1] Wibert *v.* N. Y. & E. Railroad, 2 Kernan (N. Y.), R. 214. See Blackstock *v.* N. Y. & E. Railroad, 1 Bosw. 81.

[2] Riddon *v.* Great Northern Railway Co. 28 Law Jour. Rep. (N. S.), Exch. 51; 4 Hurl. & Norm. (Am. Ed.), 847. The case is not in the English edition.

[3] Parsons *v.* Hardy, 14 Wend. R. 215; Boner *v.* Merchants Steamboat Co. 1 Jones (N. C.), R. 217; Abbott on Shipp. P. 3, ch. 3, § 1 to 11, 5th edit.; Gatliffe *v.* Bourne, 4 Bing. New Cas. 314, 329, 330. See Hand *v.* Baynes, 4 Whart. R. 204; Bowman *v.* Teall, 23 Wend. R. 306; Ante, § 511. See also, Eagle *v.* White, 6 Whart. R. 505.

[4] Parsons *v.* Hardy, 14 Wend. R. 215; Hand *v.* Baynes, 4 Whart. R. 204, 210; Bowman *v.* Teall, 23 Wend. R. 396; Ante, § 511.

[5] Harmony *v.* Bingham, 2 Kernan, R. 99.

[6] Supra, note 1. See Lowe *v.* Moss, 12 Illinois R. 477.

ligence.[1] Neither will he be obliged to send on the goods at his own expense by a land conveyance in such a case. In short, as to the time of delivery, common carriers stand upon the same ground as ordinary bailees for hire. They may excuse delay in the delivery of goods by accident or misfortune, although not inevitable, or produced by the act of God. It is sufficient if they exert due care and diligence to guard against delay, and the goods are finally delivered in safety.[2] [But if a bill of lading contains a stipulation to deliver goods in good order, "the dangers of the railroad, fire, leakage, and all unavoidable accidents excepted," this does not discharge the carrier from delivery by the time fixed in the contract, although the delay arose from an unavoidable accident; for the exception, "unavoidable accident," in the bill, must refer to dangers affecting the condition of the goods.[3]]

§ 545 *b*. Care must also be taken to deliver the goods to the right person, as well as at the proper time, and at the proper place. For if the delivery be by the carrier to a wrong person, although it may have been made by his own innocent mistake, or by his being imposed upon, he will be liable to the true owner for the whole value of the goods so lost. Indeed, such a wrongful delivery is in the common law treated as a conversion of the property.[4]

§ 546. Cases may often occur, where a person is at once a carrier of goods, and an agent or factor for the sale of them; and the inquiry may present itself, when, under such circumstances, his liability as carrier terminates.[5] Suppose the owner of a ship is master, and also is consignee of the goods of shippers which are put on board for sale. When do

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[1] Parsons *v.* Hardy, 14 Wend. R. 215; Hand *v.* Baynes, 4 Whart. R. 204, 210.

[2] Parsons *v.* Hardy, 14 Wend. R. 215.

[3] Harmony *v.* Bingham, 1 Duer, R. 209.

[4] Stephenson *v.* Hart, 4 Bing. R. 476; Duff *v.* Budd, 3 Brod. & Bing. R. 177; Youl *v.* Harbottle, Peake, R. 149; Devereux *v.* Barclay, 2 Barn. & Ald. R. 702; Stephens *v.* Elwall, 4 Maule & Selw. R. 259; Ante, § 450, 543; Post, § 570; Powell *v.* Myers, 26 Wend. R. 591, 595; The Huntress, Daveis, R. 82; Logan *v.* Pontchartrain Railroad Co. 11 Robinson, Louis. R. 24.

[5] See Ante, § 446 to 449, 451 to 453, 535 to 537.

his right and responsibility commence and terminate in each capacity? It has been decided, that during the voyage he retains the character of owner and master; and of course during the voyage he is responsible as carrier.[1] But after his arrival at the port of destination, and the landing of the goods there, it would seem that his duty as carrier is at an end. Suppose a case in which the master is consignee, and not owner of the goods; is the owner of the ship, as carrier, responsible for the acts of the master after the landing of the goods at the port of destination, either before or after the sale? If by the course of a particular trade, or the dealings between the particular parties, it is the usage for the master to take the consignment of the goods shipped, and to sell the same, and to receive, on behalf of the owner of the ship, a compensation for the whole service in the name of freight, which compensation is divisible between the owner and the master, according to their own private agreement; in such a case, the owner of the ship may be responsible for the acts of the master throughout; because the latter, in such a case, acts as his agent; although it might be otherwise, if the master acted as factor solely for the shipper, and received a distinct compensation from him. But in such a case, the owner of the ship would seem to be liable, not in the character of a common carrier, but merely as a factor; and the responsibility of the one is (as we have seen) materially different from that of the other.[2]

§ 547. The case of Kemp *v.* Coughtry[3] may seem to countenance a different doctrine. There the master of a coasting vessel was employed to carry goods from Albany to New York, and the usual course of the trade was, for the master to sell the goods at New York, without charging any thing more than the ordinary freight, and to account to the owner

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[1] Kendrick *v.* Delafield, 2 Cain. R. 67; Cook *v.* Com. Ins. Co. 11 Johns. R. 40; Earle *v.* Rowcroft, 8 East, R. 126, 140; Crousillat *v.* Ball, 4 Dall. R. 294.

[2] Emery *v.* Hersey, 4 Greenl. R. 407; Kemp *v.* Coughtry, 11 Johns. R. 107; Kendrick *v.* Delafield, 2 Cain. R. 67; Abbott on Shipp. P. 3, ch. 2, § 10, p. 98, n. (3), Amer. edit. 1829; Id. P. 2, ch. 4, § 3, p. 134, n. (1), Amer. edit. 1829; Ante, § 444, 446 to 449, 451 to 453, 455, 535 to 537.

[3] 11 Johns. R. 107.

of the goods for the proceeds, and not to the owners of the vessel. The master, after receiving the goods, carried them to New York, and sold them there; and brought the money (the proceeds of the sale) on board, and put it into his trunk; and he and his crew having left the vessel a short time after, locking the cabin, upon his return the cabin and trunk were found broken open and the money stolen. It was resolved, upon this state of facts, that the owners (the master being one), were responsible for the loss. The Court appear to have treated the case as one arising against them solely in the character of common carriers. The reasoning was, that the money, when on board, was to be considered exactly the same as a return cargo, purchased with the proceeds of the goods; and in such a case it would be clear, that the liability of common carriers would attach on the owners.

§ 548. But, upon the actual posture of the facts in that case, the very question was, whether the specific money on board was to be treated as cargo, or was to be carried back for hire; and whether the master was bound to carry back the specific money received by him, or was only bound to pay over and account to the shipper for the amount and value of the proceeds in any money whatsoever. Now, it is certainly no part of the duty of a common carrier to sell goods, and to account for the proceeds. If he sells, it is not as a carrier, but as a factor. The owners of the vessel may be liable for his acts as factors, if the course of trade makes him their agent in the business of selling. But when there is a right delivery of the goods at the place of destination, the duty of the carrier, as such, would seem to cease, and the duty of factor to commence. If the specific money received, or any other goods bought with it, are to be returned in the same vessel to the original port, and the freight paid contemplates that course of trade, then, as soon as the goods or money are put on board for the purpose of the return carriage, the liability of the carrier certainly re-attaches. But the evidence in the case went to show, not that there was to be any such return of the particular money or goods in the vessel, but merely that there was a liability of the master to account for the proceeds to the owners of the goods, and not to the owner of the vessel. Perhaps the application of the law

to the facts, rather than the law itself, as laid down in the case, would deserve further consideration.[1]

§ 549. Fifthly. We come next to consider the effect of special contracts and notices of carriers. It was formerly a question of much doubt, how far common carriers on land could by contract limit their responsibility, upon the ground, that, exercising a public employment, they are bound to carry for a reasonable compensation, and have no right to change their common-law rights and duties.[2] And it was said, that, like innkeepers, they are bound to receive and accommodate all persons, as far as they may, and cannot insist upon special and qualified terms. The right, however, of making such qualified acceptances by common carriers seems to have been asserted in early times. Lord Coke declared it in a note to Southcote's case;[3] and it was admitted in Morse *v.* Slue.[4] It is now fully recognized, and settled beyond any reasonable doubt, in England.[5] [And it is now the admitted doctrine in America, that it is competent for a carrier, by an express contract, to limit his common-law liability, or, more properly perhaps, by special contract, to decline to carry goods *as* a common carrier, and to assume to carry them only as a *special carrier*,[6] and therefore subject only to the duties and liabilities

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[1] See Allen *v.* Sewall, 2 Wend. R. 327; s. c. 6 Wend. R. 363.

[2] 2 Kent, Comm. Lect. 40, p. 605, 606, 607, 4th edit.; 1 Bell, Comm. 472, 473, 5th edit.; 1 Bell, Comm. § 404, 4th edit.; Beckman *v.* Shouse, 5 Rawle, R. 179, 189; Post, § 554.

[3] 4 Co. Rep. 84.

[4] 1 Vent. R. 238.

[5] Austin *v.* Manchester, &c., Railway Co. 11 Eng. Law & Eq. R. 512; 10 Com. B. 454; Nicholson *v.* Willan, 5 East, R. 507; Clay *v.* Willan, 1 H. Bl. R. 298; Harris *v.* Packwood, 3 Taunt. R. 264; Evans *v.* Soule, 2 M. & Selw. R. 1; Smith *v.* Horne, 8 Taunt. R. 146; Batson *v.* Donovan, 4 Barn. & Ald. R. 39; Riley *v.* Horne, 5 Bing. R. 217; Bodenham *v.* Bennett, 4 Price, R. 34; Down *v.* Fromont, 4 Camp. R. 41; Post, § 554; Chippendale *v.* Lancashire and Yorkshire Railway Co. 7 Eng. Law and Eq. R. 395.

[6] [And whenever this is the case, the carrier should not be declared against as a *common carrier*, but rather upon the special contract. The difference is material. Latham *v.* Rutley, 2 B. & C. 20, and 3 D. & R. 211; Walker *v.* York & North Midland Railway, 2 El. & Bl. 741; York Railway Co. *v.* Crisp,

imposed by his express contract.[1] And on the same ground, if an owner of goods send them by an express messenger, and that express messenger make a special contract with the carrier, in its nature a valid one, the owner of the goods is bound by this special contract, or in other words, the obligations of the carrier are limited by this special contract, even in an action by the owner.[2]] Still, however, it is to be understood, that common carriers cannot by any special agreement exempt themselves from all responsibility, so as to evade altogether the salutary policy of the common law. They cannot, therefore, by any special notice, exempt themselves from responsibility in cases of gross negligence, [want of skill,[3]] or fraud;[4] or, by demanding an exorbitant price,[5] compel the owner of the goods to yield to unjust and oppressive limitations and qualifications of his rights.[6] The carrier will also be equally as liable in case

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14 C. B. 527; White *v.* Great Western Railway, 2 J. Scott (N. S.), 7; Hughes *v.* Great Western Railway Co. 14 C. B. 637.]

[1] [Parsons *v.* Monteath, 13 Barb. R. 358; Moore *v.* Evans, 14 Barb. R. 524; Mercantile Insurance Co. *v.* Chase, 1 E. D. Smith, R. 139; Dorr *v.* N. J. Steam Navigation Co. 4 Sandf. R. 136. Affirmed on appeal, 1 Kernan, R. 485. Stoddard *v.* Long Island Railroad Co. 5 Sandf. R. 180; Derwort *v.* Loomer, 21 Conn. R. 246; Boswell *v.* Hudson River Railroad, 5 Bosw. 701; Kimball *v.* Rutland and Burlington Railroad Co. 26 Verm. R. 256; Swindler *v.* Hilliard, 2 Rich. R. 286; Davidson *v.* Graham, 2 Ohio, St. R. (Warden), 131. Of course this contract, like all others, must be free from fraud; and where the person sending the goods could not read the special contract which he was requested to sign, and the clerk of the company told him that his signature was of no consequence, and was a mere matter of form, whereupon he signed it, it was held that the special contract was invalid, and that the company were still liable as common carriers. Simons *v.* Great Western Railway Co. 2 J. Scott (N. S.), 620.]

[2] New Jersey Steam Navigation Co. *v.* Merchants Bank, 6 Howard (U. S.), R. 344.

[3] Graham *v.* Davies, 4 Ohio, St. R. 362.

[4] See Penn. Railroad Co. *v.* McCloskey, 11 Harris (Penn.), R. 526.

[5] Crouch *v.* The Great Northern Railway Co. 25 Eng. Law & Eq. R. 449; 11 Exch. R. 741; Piddington *v.* South-Eastern Railway Co. 5 J. Scott (N. S.), 111; Baxendale *v.* Great Western Railway Co. 5 J. Scott (N. S.), 309. And see 366, 669.

[6] Jones on Bailm. 48; Doct. and Stud. Dial. 2, ch. 38; Noy, Maxims, ch. 43, p. 93; Lyon *v.* Mells, 5 East, R. 430, 438; Harris *v.* Packwood, 3 Taunt. R.

of the fraud or misconduct of his servants, as he will be in case of his own personal fraud or misconduct.[1]

[§ 549 *a*. But the modern English cases declare that it *is* competent for a carrier in England, even since the passage of the Carrier's Act, to make a special contract which shall shield him from the consequences of his own "gross negligence." And if the consignor sign a contract declaring that he "undertakes all risks of conveyance whatsoever, and that the company will not be responsible for any injury or damage *howsoever caused*, occurring to live-stock travelling on their railway," the construction of such a contract has been to exonerate the carrier from a loss arising from gross negligence.[2] The Court of Common Pleas have adopted and acted upon the same principle.[3] And the Court of Queen's Bench on the same day arrived at the same conclusion in another case.[4] Previous intimations of such an opinion may also be found in Owen *v.* Burnett,[5] as early as 1833; more fully adopted in 1842, in the case of Hinton *v.* Dibbin,[6] before the Queen's Bench. But the American Courts have with great unanimity declared that carriers ought not to be allowed, by a special contract, to discharge themselves from loss by their own negligence or fraud.[7] And

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264, 272; Rex *v.* Kilderby, 1 Saund. R. 312 *b*, Williams's note (2); Batson *v.* Donovan, 4 Barn. & Ald. R. 21, 32; Hyde *v.* Trent, &c., Nav. Co. 1 Esp. R. 36; Maving *v.* Todd, 1 Stark. R. 72; Bodenham *v.* Bennett, 4 Price, R. 34; Brooke *v.* Pickwick, 4 Bing. R. 218. See also, Laing *v.* Colder, 8 Barr (Penn.), R. 479.

[1] Ellis *v.* Turner, 8 Term R. 531; Garnett *v.* Willan, 5 Barn. & Ald. R. 57; Ante, § 507.

[2] [Carr *v.* Lancashire and Yorkshire Railway Co. 14 Eng. Law & Eq. R. 340; s. c. 7 Exch. R. 707. See also, McManus *v.* Lancashire and Yorkshire Railway Co. 2 Hurl. & Norm. 693. And see 1 Id. 63.]

[3] [Austin *v.* Manchester, Sheffield, &c., Railway Co. 11 Eng. Law & Eq. R. 506; s. c. 10 Com. B. Rep. 454.]

[4] Morville *v.* Great Northern Railway Co. 10 Eng. Law & Eq. R. 366.

[5] 2 Cr. & Mees. R. 353; s. c. 4 Tyrwh. R. 133.

[6] 2 Ad. & Ell. (N. S.), R. 646.

[7] Reno *v.* Hogan, 12 B. Monroe, R. 63; Dorr *v.* The New Jersey Steam Nav. Co. 4 Sandf. R. 136; Laing *v.* Colden, 8 Barr (Penn.), R. 479; Swindler *v.* Hilliard, 2 Richardson, R. 286; Slocum *v.* Fairchild, 7 Hill, R. 292; New Jersey Steam Nav. Co. *v.* Merchants Bank, 6 Howard (U. S.), R. 344; Cam-

the English Parliament have by statute enacted that notices limiting carriers' liability for their own neglect are null and void.[1] Since that act, a horse was sent by railway from Newbury station, directed to the owner at Eton. The sender, who had hired the horse, signed a document in these words: "Mr. Wise paid for one horse, 12*s.* 6*d.* Newbury to Windsor. Notice. The *Directors* will not be answerable for damage done to any horses conveyed by this railway. I agree to abide by the above notice." The owner lived three quarters of a mile from the station at Windsor. Sometimes the company sent up horses to his stable, but no regular course of dealing was proved. The horse arrived safely at the Windsor station, but the owner, not knowing he had been sent and appearing to claim him, it was forgotten and left tied up in a horse-box in an exposed situation for twenty-four hours, and was seriously injured. The company were held not responsible, although, to a certain extent, blamable, but the person who had forwarded the horse was said to be the real cause of the injury in not informing the owner that the horse was sent, or in not sending some person to take care of him.[2]]

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den, &c., Railroad Co. *v.* Baldauf, 4 Harris (Penn.), R. 67; Sager *v.* The Portsmouth, Saco, &c., R. R. Co. 31 Maine R. 228; Davidson *v.* Graham, 2 Ohio, St. R. (Warden), 131; 4 Ohio, St. R. 362; Goldey *v.* Pennsylvania Railroad, 6 Casey, 242; Powell *v.* Pennsylvania Railroad, 8 Casey, 414; Welsh *v.* Pittsburgh Railroad, 10 Ohio, St. R. 64.

[1] St. 17 & 18 Vict. c. 31, § 7.

[2] [Wise *v.* Great Western Railway Co. 1 Hurl. & Norm. 63. That statute also enacted, that nothing therein contained "should be construed to prevent railway companies from making such conditions with the receiving, forwarding, and delivering animals, &c., as shall be adjudged by the Court to be just and reasonable." In a recent case under it, it appeared that a person sending cattle by a railway signed a contract containing the following conditions: "A pass for a drover to ride with his stock will be given. The company is to be held free from all risk in respect to any damage arising in the loading or unloading, from suffocation, or from being trampled upon, bruised, or otherwise injured in transit, from fire, or from any cause whatsoever." A drover received a pass to go with the cattle, but they were not put into proper cattle trucks, but into vans closing with lids, ordinarily used for the conveyance of salt, to which the drover did not object. The lid of one of the vans became closed in the journey, and several cattle were suffocated, the drover at the time being in another

[§ 549 *b*. Although, when the contract is entered into, the liability of the common carrier may be limited by the agreement of both parties, it follows, of course, that, after the contract is made, he cannot refuse to execute it, nor can he limit his responsibility, unless with the consent of the other party. Accordingly, where a carrier received a package of money to convey from Sherman to Poughkeepsie, and to deliver at the bank in the latter place, and it appeared that when he arrived at Poughkeepsie the bank was shut; that he went twice to the house of the cashier, and, not finding him at home, brought the money back, and offered it to his employer, who declined to accept it; and the carrier then refused to be further responsible therefor; it was held, that, in the absence of any special contract, these facts did not constitute an excuse to the carrier for the non-performance of his undertaking.[1]]

§ 550. In respect to carriers by water, and especially to carriers by sea on foreign voyages, there has prevailed from a very early period a practice of accompanying the shipment with a bill of lading, which specifies the risk from which the carrier is to be exempted. He engages, according to the old form of the bill of lading, to make a right delivery of the goods, "the dangers of the seas only excepted." It is observable, that the acts of the king's enemies are not included in the exception;[2] and, therefore, a question has arisen, how far the express exception of the perils of the sea excludes the other exception of the common law, the acts of the king's

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carriage. It was held by the Court of Exchequer that the conditions were "just and reasonable" under 17 & 18 Vict. c. 31, § 7, and that the company were not liable. Pardington *v.* South Wales Railway Co. 1 Hurl. & Norm. 392. See also, McManus *v.* Lancashire Railway, 2 Hurl. & Norm. 693; Simons *v.* Great Western Railway, 18 C. B. Rep. 805; Chippendale *v.* Lancashire Railway, 21 Law Journal Rep. 22. See Beal *v.* South Devon Railway Co. 5 Hurl. & Norm. 875; Peek *v.* North Staffordshire Railway, 1 El. Bl. & El. 957. But the better opinion seems to be, that notices that the company will not be responsible for the consequences of their own negligence, are not just and reasonable, and the contrary decisions have been overruled. McManus *v.* Lancashire & Yorkshire Railway Co. 4 Hurl. & Norm. 327.]

[1] Merwin *v.* Butler, 17 Connect. R. 138.

[2] Abbott on Shipp. P. 3, ch. 2, § 3, 5th edit.

enemies, upon the well-known maxim, *Expressio unius est exclusio alterius.*[1] But the point has hitherto been left undecided in England.[2] We have, however, seen, that a loss by pirates is deemed a peril of the seas; and that furnishes one strong analogy in regard to captures by enemies.[3] In England the form of the bill of lading has latterly been changed, and the exception now is in the following terms: "The act of God, of the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, save risks of boats, as far as ships are liable thereto, excepted."[4] In America it is believed that the old form of the bill of lading prevails to a great extent, although not universally in practice. [A stipulation in a bill of lading, that the ship-owner is "not accountable for leakage or breakage," does not exempt him from liability for a loss by these means, arising from his own gross negligence.[5]]

§ 551. In respect to special contracts, they may be divided into two classes; first, such as are express; secondly, such as are implied. The latter class is the most frequent in cases of the carriage of goods on land. Special contracts sometimes arise from the particular dealing between the parties, either generally, or in the given case; sometimes from the general course of trade or business; and sometimes, and most usually,

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[1] Bever *v.* Tomlinson, cited in Abbott on Shipp. p. 386, 5th Am. edit.; Ante, § 35, 36, 510, 512, 526.

[2] Ante, § 512. In Williams *v.* Grant, 1 Connect. R. 487, 492, Gould, J., held, that common carriers were not liable for losses by perils of the seas, whether the bill of lading contained any exception or not. The same point was affirmed by the whole Court in Crosby *v.* Fitch, 12 Connect. R. 410. [And carriers generally are not liable for loss by inevitable accident, whether that exception be, or be not, expressed in the bill of lading. Morrison *v.* Davis, 8 Harris (Penn.), R. 171.]

[3] Abbott on Shipp. P. 3, ch. 4, § 2, 3, 4, 5th edit.; Ante, § 512.

[4] Abbott on Shipp. P. 3, ch. 2, § 3, 5th edit.; Id. ch. 4, § 1, and note (*f*).— It has been decided under this last form, that, if goods are lost by the perils of the sea, while going on shore in the ship's boat at the port of destination, the carrier is not liable for the loss, as the saving clause only extends to the same risks as if the goods were on board the ship. Johnston *v.* Benson, 1 Brod. & Bing. R. 454.

[5] Phillips *v.* Clark, 2 J. Scott (N. S.), 156. See Ante, § 549 a.

from the public advertisements and notices given by carriers, stating the terms and limits of their responsibility. [And whether the facts proved or admitted to exist constitute a special contract or not, is a question of law and not of fact for the Jury.[1] Wherever a special contract exists, changing the character of a carrier from a common to a private carrier, the latter cannot be declared against as a common carrier, but the action must be on a special contract, or for a breach of duty, arising out of such contract,[2] and if the declaration in such case set forth only the general liability of the defendant as a common carrier, the variance is fatal.[3]]

§ 552. Few questions have arisen upon the interpretation of express contracts entered into by parties for the transportation of goods. The terms of the exception in the modern bill of lading in England (it has been remarked in Lord Tenterden's Treatise on Shipping[4]), have given rise to but one judicial decision. In a contract by a bill of lading, however, it furnishes no excuse to the carrier, that the goods have been seized for a violation of the revenue laws, unless that seizure is in fact for a legal cause of forfeiture.[5]

§ 553. Many of the questions which of late years have engaged the attention of courts of justice, have been upon the validity, obligation, and effect of the notices given by common carriers and others in the course of their business. Upon this subject it will be proper to bestow a particular examination.

§ 554. First, then, as to the VALIDITY OF NOTICES by common carriers. Mr. Chief Justice Best, in the judgment

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[1] Kimball *v.* Rutland and Burlington Railroad Co. 26 Verm. R. 248.

[2] Ante, § 549, note; Kimball *v.* Rutland and Burlington Railroad Co. 26 Verm. R. 248; Shaw *v.* York and N. Midland Railway Co. 13 Ad. & Ell. (N. S.), R. 347; Austin *v.* Manchester, &c. Railway Co. 5 Eng. Law & Eq. R. 329; 17 Q. B. Rep. 600; Crouch *v.* London and Northwestern Railway Co. 7 Exch. R. 705; S. C. 14 Eng. Law & Eq. R. 498.

[3] Davidson *v.* Graham, 2 Ohio St. R. (Warden), 131; Fowles *v.* The Great Western Railway Co. 7 Exch. R. 699; S. C. 16 Eng. Law & Eq. R. 531.

[4] Abbott on Shipp. P. 3, ch. 4, § 1, 5th edit.

[5] Gosling *v.* Higgins, 1 Camp. R. 451.

already alluded to,[1] expressed a strong opinion in favor of their validity, and of the reasonableness of giving them full effect. After adverting to the fact, that the common law makes them liable for every loss, except by the act of God and the king's enemies, he proceeded to say: "As the law makes the carrier an insurer, and as the goods he carries may be injured or destroyed by many accidents, against which no care on the part of the carrier can protect them, he is as much entitled to be paid a premium for his insurance of their delivery at the place of their destination, as for the labor and expense of carrying them there. Indeed, besides the risk that he runs, his attention becomes more anxious, and his journey more expensive, in proportion to the value of his load. If he has things of great value contained in such small packages as to be objects of theft or embezzlement, a strong and more vigilant guard is required, than when he carries articles not easily removed, and which offer less temptation to dishonesty. He must take what is offered to him, to carry to the place to which he undertakes to convey goods, if he has room for it in his carriage. The loss of one single package might ruin him. By means of negotiable bills, immense value is now compressed into a very small compass. Parcels containing these bills are continually sent by common carriers. As the law compels carriers to undertake for the security of what they carry, it would be most unjust, if it did not afford them the means of knowing the extent of their risk. Other insurers, whether they divide the risk, which they generally do, amongst several different persons, or one insurer undertakes for the insurance of the whole, always have the amount of what they are to answer for specified in the policy of insurance."[2] On the other hand, Mr. Bell in his Commentaries has presented an elaborate argument against the validity of these notices, and upon the inconveniences to which they give

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[1] Riley *v.* Horne, 5 Bing. R. 217; Ante, § 491.

[2] Riley *v.* Horne, 5 Bing. R. 217, 220, 221. See also, Lord Ellenborough's remarks in Leeson *v.* Holt, 1 Stark. R. 187. See also, Smith on Merc. Law, B. 3, ch. 2, p. 233 to 238, 2d Lond. edit. 1838; pp. 284 to 291, 5th Lond. ed. 1855.

rise. His remarks will be found worthy of a perusal by every lawyer who desires to examine the subject with philosophical accuracy.[1] However, the validity of these notices seems now established in England beyond all controversy in the common law, although many learned Judges have expressed some regret that they were ever recognized in Westminster Hall.[2]

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[1] 1 Bell, Comm. p. 473 to 475, 5th edit.; 1 Bell, Comm. § 404, 4th edit. See also, The Schooner Reeside, 2 Sumner, R. 567, 575.

[2] Ante, § 549. In New York the question has received a most elaborate discussion; and it has been by a series of adjudications decided, that such notices, and even a special contract between the parties, cannot avail to change or vary the common-law responsibility of common carriers; for all such notices and special contracts are against the policy of the law, and therefore are utterly void. The whole subject underwent a careful consideration in the recent cases of Hollister *v.* Nowlen, 19 Wend. R. 234, and Cole *v.* Goodwin, 19 Wend. R. 251, which deserve the most attentive consideration of the learned reader. Those were actions against stage-coach proprietors, as common carriers, for a loss of baggage; and the proprietors had given public notice by a printed notice, "Baggage of passengers at the risk of the owners." The court held, that coach proprietors are answerable as common carriers for the baggage of passengers, unless lost by inevitable accident, or through acts of the public enemies; and that they cannot restrict their common-law liability by such a general notice, that the "baggage shall be at the risk of the owners," even although brought home to the knowledge of the passengers. But they may, by notice brought home to the passenger, require the latter to state the nature and value of the property, or may for that purpose make a special acceptance. To the same effect are the more recent cases of the Camden, &c. Transportation Company *v.* Belknap, 21 Wend. R. 354, and Clarke *v.* Faxton, 21 Wend. R. 153; Pardee *v.* Drew, 25 Wend. R. 459. And in Gould *v.* Hill, 2 Hill, N. Y. R. 623, it was expressly decided, as to common carriers generally, that they could not limit their common-law responsibility, either by notices or by a special contract. [The decision in Gould *v.* Hill was expressly overruled by the Supreme Court of N. Y. in the subsequent case of Parsons *v.* Monteith, 13 Barb. R. 359. See § 549, *ante*.] S. P. Alexander *v.* Greene, 3 Hill, R. 9, 20. See also, Wells *v.* Steam Navigation Co. 2 Comstock, R. 204. The validity of notices of this sort, by coach proprietors, to bind the passengers, as to the carriage of baggage or of goods, seems incidentally admitted in Beckman *v.* Shouse, 5 Rawle, R. 179, 189; Dwight *v.* Brewster, 1 Pick. R. 50; Thomas *v.* The Boston and Providence Railroad Co. 10 Metc. R. 472. See also, 2 Kent, Comm. Lect. 40, p. 606, 607, 4th edit.; Atwood *v.* Reliance Transp. Transportation Co. 9 Watts, R. 87. [Since the latter case, it has been expressly decided in Pennsylvania, that a carrier may limit his liability, by notice to passengers that the baggage is at their own risk. Bingham *v.* Rogers, 6 Watts & Sergeant, R. 495; Laing *v.* Colder, 8 Barr,

Parliament have at length interfered in England upon this subject; and have by statute controlled in some measure the effect of these notices, and to some extent restored the operation of the common law.[1] [But in America, the weight of authority is against the validity of public notices seeking to restrict the carrier's liability, although the existence of such notice be brought home to the owner of the goods.[2]]

[§ 554 *a*. The English statute on this subject, called "The Carrier's Act," was enacted in the year 1830, and its great importance seems to justify its insertion here, in connection with a few notes referring to the decisions upon it.

Section first enacts (omitting the preamble), that no mail contractor, stage-coach proprietor, or other common carrier by land, for hire, shall be liable for the loss[3] of, or injury[4] to,

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(Penn.), R. 479.] I have left the text as to the validity of these notices, in its original form; and the learned reader must decide for himself, how far in America they are, or will hereafter be, held valid, in this conflict of opinion. It was decided in a prior case by the Supreme Court of New York, that a similar notice will not excuse the carrier, where the loss arises from a defect in the vehicle or machinery used. Camden and Amboy Railroad, &c. Co. *v.* Burke, 13 Wend. R. 611, 627, 628.

[1] See Stat. 11 Geo. 4; Stat. 1 Will. 4, ch. 68. There is an abridged statement of these statutes in Harrison's Digest, Vol. I. p. 551, title *Carriers*, 4th edit. 1837; also in Hollister *v.* Nowlen, 19 Wend. R. 243, 249; Smith on Mercantile Law, B. 3, ch. 2, p. 233 to 238, 2d Lond. edit. 1838.

[2] See Moses *v.* The Boston and Maine Railroad, 4 Foster, R. 71; Kimball *v.* Rutland and Burlington Railroad Co. 26 Verm. R. 256; Jones *v.* Voorhees, 10 Ohio, R. 145; Davidson *v.* Graham, 2 Ohio St. R. (Worden), 131; Moses *v.* Boston & Maine Railroad, 32 N. H. R. 523; Nevins *v.* Bay State Steamboat Co. 4 Bosworth, 226; Michigan Central Railroad Co. *v.* Hale, 6 Mich. 244.

[3] [The term "loss" here means a loss by the carrier, such as by abstraction by a stranger, or by his own servants not feloniously, or by losing them from vehicles in the course of carriage, or by mislaying them, so as not to know where to find them, and the like; and does not extend to any loss occasioned to the owner of the article by reason of delay in the delivery thereof, by neglect of the carrier or his servants. And the carrier is liable for *such a loss*, although no declaration of value is made to the carrier. In Hearn *v.* London & South-western

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[4] A loss by robbery would seem to be within this part of the section. See Covington *v.* Willan, Gow. R. 115.

any article or articles or property of the descriptions following: (that is to say), gold or silver coin of this realm or of any foreign State, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewelry, watches, clocks, or timepieces of any description, trinkets,[1] bills, notes of the governor and company of the banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign stamps, maps, writings,[2] title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass,[3] china, silks, in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other

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Railway Co. 29 Eng. L. and Eq. R. 494; s. c. 10 Exch. R. 793, Parke, B., said: "The statute then proceeds to enact that no carrier shall be liable for 'the loss of, or any injury to,' any of the enumerated articles. This does not mean the loss of the moneys by the carrier, but the loss of the article itself, or injury to it. In ordinary parlance, this appears to mean the loss by the carrier of the articles committed to him, or injury to them whilst in his care, not the loss sustained by the owner by non-delivery of the article in due time or altogether, or the loss of the use of the article by him. By the term, 'the injury,' is clearly meant the injury to the article itself. Then, although the use of the term 'loss' in the preamble does not aid in the construction of the enactment, the recital of its cause does; it recites that valuable property, consisting of articles of great value in small compass, was liable to depredations; and the reason of the law must be considered as being to protect the carrier, not in all cases where the owner of the articles sustained a damage from the neglect of the carrier to carry, but in cases of a similar nature to those recited, where the chattel was either abstracted altogether, or taken from the place where it ought to be, and incapable of being delivered at the time it ought to be by reason of that sort of loss.

"We think that this is the true construction of the clause, and that the carrier is exempted only from being responsible for a loss *by him* of the particular articles named."]

[1] [A gold chain used for an eye glass, is not within this description. Davey *v.* Mason, Car. & M. R. 45. But bracelets, shirt pins, rings, brooches, and ornamented tortoise shell and pearl port monnies, have been held trinkets. German silver fusee box is not. Bernstein *v.* Baxendale, 6 J. Scott (N. S.), 251.]

[2] As to what is a writing, and that it must be of some value, see Stoessiger *v.* The South-eastern Railway Co. 25 Eng. Law and Eq. R. 235; 3 El. & Bl. 549.

[3] See Owen *v.* Burnett, 2 Cr. & Mees. R. 353. Smelling-bottles of glass are within the act. Bernstein *v.* Baxendale, 6 J. Scott (N. S.), 251.

materials,[1] furs,[2] or lace, or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving-house[3] of such mail contractor, stage-coach proprietor, or other common carrier, or to his, her, or their bookkeeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid; the value and nature of such article or articles, or property, shall have been declared by the person or persons sending or delivering the same,[4] and such increased charge as here-

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[1] Silk dresses made up for wearing are not within this description. Davey *v.* Mason, Car. & Marshm. R. 45. But silk watch-guards are. Bernstein *v.* Baxendale, 6 J. Scott (N. S.), 251. So are silk hose. Hart *v.* Baxendale, 6 Exch. R. 769. And Davey *v.* Mason was there doubted. See 6 J. Scott (N. S.), 261.

[2] Hat bodies, which are made partly of the soft substance which is taken from the skin of rabbits, and partly from the wool of sheep, do not come under the description of *furs*, as used in the above act. Mayhew *v.* Nelson, 6 Car. & Payne, N. P. R. 58.

[3] See Syms *v.* Chaplin, 5 Ad. & Ell. R. 634.

[4] Under this clause, it is the duty of the sender of goods, to take the initiative by giving notice to the carrier of their value and nature, in order to charge the carrier for their loss; and this whether the goods are delivered to the carrier at his office or elsewhere. The notice to be affixed in the office of the carrier under section two, is required only for the purpose of enabling him to make an increased charge for the conveyance of such goods, after having received notice of their value and nature from the sender. In Baxendale *v.* Hart, 6 Exch. R. 769; s. c. 9 Eng. Law and Eq. R. 505, Patteson, J., said: "The 1st section of the 1 Will. 4, c. 68, has a plain and obvious meaning. The recital shows, that the giving of notice by persons who send parcels containing a particular description of goods, was one object of the act. Certain articles are there enumerated, for the loss of which the carrier is not liable, unless at the time of their delivery their value and nature have been declared by the person sending or delivering the same, 'and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.' These latter are the only words in this section which afford any ground for saying that a carrier is bound to give a notice of any kind. The meaning of the legislature, to be gathered from the 1st section, was, that persons who send by a carrier goods of a particular kind, should be bound,

inafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.[1]

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however they may be delivered, to give information of the nature and value of the articles; and the subsequent sections of the act contain only certain provisions as to what is to be done by the carrier when they are received. Although the value and nature may be declared by the sender, it does not necessarily follow that the parties would be immediately affected thereby; but another clause is to be acted on. The first step to be taken is for the sender of the goods to give notice of the value and nature of the goods he sends. The second is, that the carrier is entitled to have a larger charge; and he cannot have that larger charge, or save himself from responsibility, by saying: 'I will have such and such a sum of money,' but he must have a notice of what he proposes to demand, beyond his usual charges, from the whole world; and, for that purpose, it may be necessary he should put up a tariff, in his office. Section two applies to a notice of this kind, and not to a notice that the carrier means to avail himself of the benefit of the act. The act of parliament makes it necessary for the sender to state the value and nature of the articles, in the first instance; and this construction seems to reconcile all the provisions of the act. Mr. Bramwell says that the latter part of the second section means, that all persons who deliver at the office are bound by the notice there set up, without further proof; and, therefore, he argues, that no person is in consequence to maintain an action, unless there has been that notice and a delivery at the office, in order that he may see that notice; in fact, that it applies only to a delivery at the office. But that would vitiate the primary object of the statute. We think the act of parliament requires the person sending the goods to give that information which he alone can give, and that the carrier who charges an unusual price is to put up in his office a tariff of such prices, and is bound, if required, to give a receipt when the money is paid. This all follows upon the first step to be taken by the sender; if he does not take that step, we think he cannot maintain an action for the loss of goods of the description specified in the statute. That declaration must be made in all cases, wherever the delivery may be, whether it is at the office or in the road, or anywhere else: and then, if the sum mentioned in the tariff is demanded and paid, and the goods are lost, the sender may recover their value. The carrier is also to give a receipt, if required, or he loses the benefit of being protected by the act; but in no case can the sender recover without he has taken the step which the legislature intended he should."

[1] The object of this act is twofold; *first*, it is that the party receiving the article may be apprised of its nature, in order that he may give it the greatest degree of protection; and, *secondly*, that as he incurs an additional danger and risk, he should have an increased compensation. Per Bayley, B., in Owen *v.* Burnett, 2 Cromp. & M. R. 359. The above section, therefore, is not confined to "articles of great value in small compass," but extends to all the articles enumerated in the enacting clause; and to entitle a party, who has not paid

[§ 554 *b*. Sections second, third, and fourth, provide that when any parcel or package containing any of the articles

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the increased rate of charge (the notice required by § 2 being affixed in the office), to recover for loss or injury to an article of such description, it is not sufficient that the parcel be of such a kind as to indicate that it is one of value, or even that there be an inscription to that effect, but there must be an *express declaration* of its nature and value. Id.; Boys *v.* Pink, 8 Car. & P., R. 361. The act, it should seem, affords protection even in cases of *gross negligence.* Owen *v.* Burnett, 2 Cromp. & M. R. 353; Hinton *v.* Dibbin, 2 Ad. & Ell. (N. S.), 646. See Wyld *v.* Pickford, 8 Mees. & Welsb. R. 443.

With regard to the general effect of the above statute, it is to be observed, *first*, That it relates solely to carriers by *land; secondly*, That it extends to the *particular articles* enumerated only in case their aggregate value *exceeds* £10; *thirdly*, That it exempts the carrier from his common-law responsibility as to *such* goods (unless the loss arise from the *felony* of his *servants*), *only* in the event of his having affixed a public and conspicuous notice in the receiving office, notifying the extra charges for carrying such valuable articles, or in the event of a special contract; *fourthly*, That if the notice be duly affixed, although not seen by the consignor or owner, the carrier is not responsible as to the enumerated description of goods (if the loss do not arise from the *felony* of his servants), unless the value and nature of the goods be made known, and the increased rate of charge for carriage to be paid to, or an agreement to pay it, be accepted by the carrier; but that the refusal to give on demand a receipt for the goods and extra charge deprives him of the protection of the act; *fifthly*, That as to all goods *not specifically mentioned* in this act, and as to goods of the description therein mentioned, when the value of the latter is not above £10, the *common-law* liability continues *although such notice be given*, or any public *notice* or declaration be made or given by the carrier, attempting to limit his liability; *sixthly*, That the act does not preclude the parties from entering into a *special contract* as to the conveyance of goods of any description or value; and that under the act, the merely giving the *public* notice, though known to the consignor or owner of the goods, cannot be deemed to constitute a special contract for this purpose; and *seventhly*, That it seems that if the loss or injury be occasioned by the personal neglect or misconduct of the coachman, guard, bookkeeper, or *other servant* of the carrier, in a case in which the carrier himself is not responsible, such coachman, &c., may be sued by the owner of the goods for the consequent damage (Chitty, Jun. Contr. 3d edit. p. 494). That author observes: "It was decided before the statute 1 Will. 4, that the usual carrier's notice afforded no defence if he were guilty of any *misfeasance* or *wrongful act*, *inconsistent* with the contract to convey; as if he *omitted* to *forward* the goods (Garnett *v.* Willan, 5 B. & Ald. R. 61), or sent them by another coach or conveyance than that agreed upon (Garnett *v.* Willan, 5 B. & Ald. R. 61; Sleat *v.* Fagg, Id. 342), or beyond the place of destination (Bodenham *v.* Bennett, 4 Price, R. 31), or by an unusual route (Davis *v.* Garrett, 4 Moore & P.

above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of ten pounds, it shall be lawful for such contractors, stage-coach proprietors, and other common carriers to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters[1] in some public and conspicuous part of the office, warehouse, or other receiving house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the

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540; s. c. 6 Bing. R. 716). It was also held, that the notice gave no protection in cases of *fraud* or *gross neglect*, or *delivery to a wrong person* (Lyon *v.* Mells, 5 East, R. 428; Brooke *v.* Pickwick, 4 Bing. R. 218; s. c. 12 Moore, R. 447; Birkett *v.* Willan, 2 B. & Ald. R. 356; Langley *v.* Brown, 1 Moore & Payne, R. 583; Stephenson *v.* Hart, 1 Moore & Payne, R. 357; s. c. 4 Bing. R. 476), or if the carrier's servants stole the goods (Bradley *v.* Waterhouse, Mood. & Malk. R. 154; s. c. 3 Car. & P. R. 318). In these cases it was considered that the ground of action was, the carrier's *neglect* to *perform* his contract. Although the *statute* might, even in such cases, protect the carrier if the goods were of the description therein mentioned, and the owner neglected to insure them according to the public notice, and the action were to recover damages for the *loss* or *injury* to the goods (Hinton *v.* Dibbin, 2 Ad. & Ell. (N. S.), R. 646); yet it would seem that the carrier might be liable for *damages* occasioned by the *delay* or *misfeasance*, as for the loss of the market, unconnected with the loss of or injury to the goods (Black *v.* Baxendale, 1 Exch. R. 410), provided the value and nature of the parcel were communicated to the carrier, and he accepted the goods for the purpose of carrying them. In such case it would be proper to declare for not *carrying* according to the directions given, and, on the contrary, sending the goods by a different route; or for not forwarding or carrying in a reasonable time, laying a special damage from the *delay*, &c. And see in general, as to the *common-law* responsibility of carriers (Id. 495; Smith's Mercantile Law, B. 3, ch. 2; Chitty on Contr. 4th edit. 430). The defence given by the above statute must be specially pleaded (Syms *v.* Chaplin, 5 Ad. & Ell. R. 634; s. c. 1 Nev. & P. R. 129), and the felonious stealing by the carrier's servant must, it would seem, be replied to a plea framed on this section. (See Machu *v.* The London & South-western Railway Co. 2 Exch. R. 415.) See the form of the plea, Chitty, Jun., Precedents in Pleading, 284, 293.

[1] Such a notice, to be of any avail, must, it would seem, be of such large characters that a person delivering goods at the office could not fail to read it without gross negligence. Clayton *v.* Hunt, 3 Camp. R. 27; Butler *v.* Heane, 2 Camp. R. 415.

safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice, without further proof of the same having come to their knowledge. Provided always, That when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted as hereinbefore mentioned, the person receiving such increased rate of charge, or accepting such agreement, shall, if thereto required, sign a receipt for the package or parcel acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage-coach proprietor, or other common carrier as aforesaid, shall not have or be entitled to any benefit under this act, but shall be liable and responsible as at common law, and be liable to refund the increased rate of charge.

And provided always — "That from and after the first day of September now next ensuing, no public notice or declaration heretofore made, or hereafter to be made, shall be deemed or construed to limit or in any wise affect the liability at common law of any such mail contractor, stage-coach proprietors, or other public common carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them:[1] but that all and every such mail contractors, stage-coach proprietors and other common carriers as aforesaid shall from and after the said first day of September be liable, as at the common law, to answer for the loss or any injury to any articles and goods in respect whereof they may not be entitled to the

[1] This section applies only to *public* notices, declaring merely that *such* notices shall not limit the carrier's liability. But it does not forbid the formation of a special contract, by giving a personal notice to the sender, and by his assent to the terms thereof, by sending goods after a full knowledge of the limitation intended by the carrier. And a jury might be warranted in finding a special contract from such facts. See Walker *v.* The York and North Midland Railway Co. 2 Ellis & Blackb. R. 730; s. c. 22 Eng. Law & Eq. R. 315.

benefit of this act, any public notice or declaration by them made and given contrary thereto, or in any wise limiting such liability, notwithstanding.]

[§ 554 *c*. And sections fifth to ninth declare, That for the purposes of this act every office, warehouse, or receiving-house[1] which shall be used or appointed by any mail contractor or stage-coach proprietor or other such common carrier as aforesaid, for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving-house, warehouse or office of such mail contractor, stage-coach proprietor, or other common carrier; and that any one or more of such mail contractors, stage-coach proprietors, or common carriers shall be liable to be sued by his, her, or their name or names only: and that no action or suit commenced to recover damages for loss or injury to any parcel, package, or person, shall abate for the want of

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[1] An inn, where a book is kept for booking parcels by a particular coach, which stops regularly there to take in and deliver parcels, is a *receiving-house* for parcels within the meaning of this act; although other coaches stop at the same inn for the same purpose, and the innkeeper sends the parcels by which coach he pleases. 1 C. B. (N. S.), 325; Syms *v.* Chaplin, 1 Nev. & P. R. 129; S. C. 5 Ad. & Ell. R. 634. See Burrell *v.* North, 2 Car. & K. R. 680; Davey *v.* Mason, Car. & M. R. 45; Boys *v.* Pink, 8 Car. & Payne, 361. Where the plaintiff sent a parcel directed to F. in London, to the postmaster at B., who took in parcels for the mail-cart between B. and M., and who booked it to an inn at M., where the defendants' coach stopped to take parcels; and the carrier received the carriage for it to M. from the innkeeper, who was in the habit of booking parcels for the defendants' coach, and did book this parcel to London, and delivered it to the coachman of the defendants; it was held, that the carrier was the agent of the plaintiff, and the innkeeper the servant of the defendants; and therefore that the plaintiff might recover damages from the defendants for the loss of the parcel. Syms *v.* Chaplin, *supra*.

It has been held that the contract entered into by a *booking-office keeper*, who takes in parcels to be forwarded by carriers, is only to deliver safely to the carrier, not to the consignee. In an action on the case, therefore, against *such party*, where the declaration alleges that a parcel was delivered to the defendant, and that he promised to take care of it, that it might be forwarded to its destination, and avers that it was lost through his negligence, on which issue is joined; — it is not sufficient evidence of negligence to show that the parcel was delivered to the defendant, and that it had not reached its destination. Gilbart *v.* Dale, 1 Nev. & P. R. 22; S. C. 5 Ad. & Ell. R. 543. And see Midland Railway Co. *v.* Bromley, 17 C. B. 378.

joining any co-proprietor or copartner in such mail, stage-coach or other public conveyance by land, for hire as aforesaid:

Provided always, That nothing in this act contained shall extend or be construed to annul or in any wise affect any special contract between such mail contractor, stage-coach proprietor, or common carrier, or any other parties for the conveyance of goods and merchandise:

Provided also, That where any parcel or package shall have been delivered at any such office, and the value and contents declared as aforesaid, and the increased rate of charges been paid, and such parcels or packages shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled to recover back such increased charges so paid as aforesaid, in addition to the value of such parcel or package:

Provided also, That nothing in this act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ,[1] nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct:

Provided also, That such mail contractors, stage-coach proprietors, or other common carriers for hire, shall not be concluded as to the value of any such parcel or package by the value so declared as aforesaid, but that he or they shall in all cases be entitled to require, from the party suing in respect of any loss or injury, proof of the actual value of the contents by the ordinary legal evidence, and that the mail contractors, stage-coach proprietors, or other common carriers as aforesaid shall be liable to such damages only as shall be so proved as

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[1] Where a carrier enters into a sub-contract with other parties with respect to goods which he has undertaken to carry, the servants employed by the latter are "servants in the employ" of the carrier, within the meaning of this section. Machu *v.* London and South-western Railway Company, 2 Exch. R. 415. See Boyce *v.* Chapman, 2 Bing. N. C. 222.

aforesaid, not exceeding the declared value, together with the increased charges as before mentioned.

The remaining sections do not bear upon the question of liability.]

§ 555. In further examining this subject it will be proper to consider, first, the nature and effect of these notices; secondly, upon whom they are obligatory; thirdly, the rights and duties of each party in respect to them; fourthly, the effect of fraud and concealment in respect to the goods; fifthly, the degree of liability imposed by law upon the carrier, notwithstanding such notices; and sixthly, what amounts to a waiver, or discharge, on either side, of the obligation of such notices.

§ 556. First. The nature and effect of these notices. It is impossible to lay down any universal rule as to the construction of them, because they are not generally conceived in the same terms, and each must therefore be governed by its own peculiar language, and by the limitations which are engrafted into it. The general tenor of these notices is to declare that the carrier will not be responsible for any loss of goods beyond a certain value, unless entered and paid for accordingly. In case there is not such an entry and payment, it will depend upon the true construction of the terms of the particular notice, whether the carrier will be liable, even to the extent of the fixed value, in case of a loss of goods of greater value, and not paid for as such. Thus, in one case, where the terms of the contract were that "cash, plate, jewels, &c., would not be accounted for, if lost, of more than £5 value, unless entered as such," and paid for, the Court were of opinion that the carrier was not liable for any loss whatever in case the goods exceeded the specified value, and no entry or payment of the increased value had been made.[1] In another case, where the words were, that "no more than £5 will be accounted for, for goods," &c., unless the special terms of the notice were complied with, it was decided, that in case of a loss the carrier might still be

[1] Clay *v.* Willan, 1 H. Black. R. 298; Izett *v.* Mountain, 4 East, R. 371; Nicholson *v.* Willan, 5 East, R. 507; Harris *v.* Packwood, 3 Taunt. R. 264; Marsh *v.* Horne, 5 Barn. & Cress. R. 322; 1 Bell, Comm. p. 475, 5th edit.

held responsible to the value of £5.[1] It is of great practical importance, therefore, to carriers, to fix the terms of their notices in such a manner as to avoid all ambiguities of this sort; as, in all cases of doubt, they will be construed unfavorably to the carrier.[2]

§ 557. But the notice, in all cases where it is brought home to the parties, is [or rather in England was] in the absence of all contravening circumstances, deemed proof of the contract actually subsisting between them; and of course it varies, *pro tanto*, the general liabilities of the common law in respect to common carriers.[3] And neither party will, under such circumstances, be permitted to escape from the obligatory force of the terms of the notice. It is, then, to be construed like every other written contract; and, so far as the exceptions extend, they convert the general law into a qualified responsibility.[4] Where a carrier gives notice that he will not be liable for goods lost beyond £5, unless paid for, such notice extends to goods of passengers going by the conveyance, as well as to goods sent alone by the same conveyance.[5]

§ 558. Secondly. Upon whom such notices are obligatory. The mere advertisement by the carrier of the terms and limitations of his responsibility, however public it may be, will have no effect, except upon those to whom knowledge of it is directly or constructively brought home.[6] Thus, it will not be sufficient that the notice has been publicly posted up in the carrier's office, in writing or in print, unless the party who is to be affected by it is proved to have read it; or unless other circum-

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[1] Clarke *v.* Gray, 6 East, R. 564; Cobden *v.* Bolton, 2 Camp. R. 108.

[2] Butler *v.* Hearne, 2 Camp. R. 415.

[3] But see Ante, § 554, note (3), and the cases there cited, and especially Hollister *v.* Nowlen, 19 Wend. R. 234; Cole *v.* Goodwin, 19 Wend. R. 251.

[4] Nicholson *v.* Willan, 5 East, R. 507; Maving *v.* Todd, 1 Stark. R. 72; Harris *v.* Packwood, 3 Taunt. R. 271, 272.

[5] Clarke *v.* Gray, 4 Esp. R. 177; s. c. 6 East, R. 568. But see Brooke *v.* Pickwick, 4 Bing. R. 218.

[6] Davis *v.* Willan, 2 Stark. R. 279; Gibbon *v.* Paynton, 4 Burr. R. 2302; Evans *v.* Soule, 2 M. & Selw. R. 1; Roskell *v.* Waterhouse, 2 Stark. R. 462; 1 Bell, Comm. p. 475, 5th edit. See The Great Western Railway Co. *v.* Goodman, 11 Eng. Law and Eq. R. 546; 12 Com. B. 313.

stances are adduced which establish his knowledge of it.[1] If the notice is published in a newspaper, it is not sufficient proof, unless accompanied by some evidence that the party is accustomed to read the newspaper, so as to lay a foundation for presuming knowledge.[2] If the carrier has published two different notices, each of which is before the public at the time of the carriage, that will bind him which is least beneficial to himself; and if, at the time of the carriage, he delivers a written notice without any limitation of responsibility, that nullifies his prior notice, containing a limitation.[3] A notice known to the principal binds him in respect to all his agents who send goods by the same carrier; and, on the other hand, a notice known to the particular agent who sends goods binds the principal in respect to such goods, notwithstanding the principal is personally ignorant of the notice.[4] A notice suspended at the offices at the *termini* of the journey will not bind persons who deliver goods at intermediate places on the route, unless notice is brought home to them.[5]

§ 559. Where several persons are carriers, as partners, and publish a notice, and one of the partners afterwards undertakes, without any communication with, or knowledge of, the others, to carry packages for a particular person free from expense, it seems that such a contract is not binding on the partnership in derogation of their notice, if such act is not within the scope of his authority, or is done by connivance in fraud of their rights.[6]

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[1] Kerr *v.* Willan, 2 Stark. R. 53; Davis *v.* Willan, 2 Stark. R. 279; Clayton *v.* Hunt, 3 Camp. R. 27; Butler *v.* Hearne, 2 Camp. R. 415; Evans *v.* Soule, 2 M. & Selw. R. 1; Gibbon *v.* Paynton, 4 Burr. R. 2302; Verner *v.* Sweitzer, 32 Penn. St. R. 213.

[2] Leeson *v.* Holt, 1 Stark. R. 186; Rowley *v.* Horne, 3 Bing. R. 2; Munn *v.* Baker, 2 Stark. R. 225.

[3] Munn *v.* Baker, 2 Stark. R. 255; Cobden *v.* Bolton, 2 Camp. R. 108. But see Philips *v.* Edwards, 3 Hurl. & Norm. 813.

[4] Mayhew *v.* Eames, 3 Barn. & Cres. R. 601; s. c. 1 Carr. & Payne, R. 559; Maving *v.* Todd, 1 Stark. R. 72; Clarke *v.* Hutchins, 14 East, R. 475.

[5] Gouger *v.* Jolly, Holt, N. P. R. 317; Clayton *v.* Hunt, 3 Camp. R. 27.

[6] Bignold *v.* Waterhouse, 1 M. & Selw. R. 255; Helsby *v.* Mears, 5 Barn. & Cress. R. 504.

§ 560. In all cases where the notice cannot be brought home to the person interested in the goods, directly or constructively, it is a mere nullity, and the carrier is responsible according to the general principles of the common law.[1]

§ 561. Thirdly. The rights and duties of each party growing out of notices. It may be stated generally, that a carrier who undertakes to carry goods is, like every other person, bound to perform his contract in the mode and to the extent involved in his contract. Wherever he undertakes to carry and deliver goods, he cannot exempt himself from responsibility by transferring the goods to another carrier, or by sending them by another conveyance. His contract is deemed a contract for personal care and diligence by himself or his own servants. If, therefore, the goods are sent by a different conveyance from that implied by the undertaking, or in a different manner, and they are lost, the carrier will be liable for the loss, although otherwise he might have been exonerated from it by the terms of a notice.[2] The carrier is in like manner responsible, if he carries the goods beyond the place of destination, and they are lost, although otherwise his notice would protect him.[3]

§ 562. It is also (as has been already stated) a part of the implied contract of every carrier, to employ a vehicle suitable for the transportation; and if by water, to employ a vessel reasonably stout, strong, and well equipped for the voyage.[4] And he is not at liberty to transport the goods in any other vessel in the course of the voyage, except from mere necessity, when his own ship becomes incapable by inevitable casualty from performing it. The existence of the common notice will not in any respect change this implied duty.[5] [But proof

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[1] Brooke *v.* Pickwick, 4 Bing. R. 218, 222; Ante, § 556, 557, 558; 1 Bell, Comm. 475, 5th edit.

[2] Garnett *v.* Willan, 5 Barn. & Ald. R. 53; Sleat *v.* Fagg, 5 Barn. & Ald. R. 342; Nicholson *v.* Willan, 5 East, R. 507; Duff *v.* Budd, 3 Brod. & Bing. R. 177; Rolle, Abr. *Action sur Case*, C. pl. 3; Barnwell *v.* Hussey, 1 Const. Rep. (S. Car.), 114; Post, § 570.

[3] Ellis *v.* Turner, 8 Term R. 531; Ante, § 545 *b*; Post, § 570.

[4] Ante, § 509; Post, § 571 *a*, 592.

[5] Abbott on Shipp. P. 3, ch. 3, § 1, 8, 5th edit.; Lyons *v.* Mells, 5 East, R.

of a special contract with the consignor, may in England exonerate a carrier from a loss through defective vehicles, if the terms of such contract be sufficiently broad,[1] but this is not uniformly admitted in this country.[2]]

§ 563. On the other hand, the owner of the goods is bound to observe good faith toward the carrier (of which more will be said hereafter), and to pack his goods, and put them in a fit condition for the journey; and if he does not, he must bear any loss arising from his own neglect.[3] But the carrier himself may by implication dispense with an exact performance of any part of his duty, and assume upon himself the proper care of securing the property in a fit state for the journey.[4]

§ 564. Thus much may suffice in this place, as to the general rights and duties of the parties under notices, as the subject will be resumed under the succeeding heads.

§ 565. Fourthly. The effect of concealment or fraud. It is the duty of every person sending goods by a carrier to make use of no fraud or artifice to deceive him, whereby his risk is increased, or his care and diligence may be lessened.[5] And if there is any such fraud or unfair concealment, it will exempt the carrier from responsibility under the contract, or, more properly speaking, it will make the contract a nullity.[6] Thus, where notes to the amount of £100 were packed in an old mail-bag, and stuffed with hay to give it a mean appearance, and in this state were delivered to a carrier, and the bag arrived safe, but the notes were stolen; this concealment was held to be such a fraud upon the carrier, as to discharge him

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428; Evans *v.* Soule, 2 Maule & Selw. R. 1; Marsh. Insurance, B. 1, ch. 7, § 5, p. 249, 2d edit.; Sager *v.* Portsmouth, &c. Railroad Co. 31 Maine, R. 238.

[1] See Chippendale *v.* Lancashire & Yorkshire Railway Co. 7 Eng. Law and Eq. R. 395.

[2] Welsh *v.* Pittsburgh Railway Co. 10 Ohio St. R. 72.

[3] Ante, § 492 *a*.

[4] Beck *v.* Evans, 16 East, R. 245; Stuart *v.* Crawley, 2 Stark. R. 323.

[5] Edwards *v.* Sherratt, 1 East, R. 604; 2 Kent, Comm. Lect. 40, p. 603, 604, 4th edit. See Coxe *v.* Heisley, 7 Harris (Penn.), R. 243.

[6] Batson *v.* Donovan, 4 Barn. & Ald. R. 21; 2 Kent, Comm. Lect. 40, p. 603, 604, 4th edit.

from all responsibility for the loss.[1] In this case there was an artifice made use of in order to mislead the carrier. The doctrine is not confined to mere cases of concealment or suppression of facts for the purpose of misleading; but it applies to all cases of false affirmations, having the same object.[2] And wherever the owner represents the contents of the package to be of a particular value, he will not be permitted, in case of a loss, to recover from the carrier any amount beyond that value.[3]

§ 565 *a*. There is an old case, which turned on this doctrine, which is briefly reported, and may, therefore, not unfitly be given at large in this place. It was an action on the case, brought against a country carrier for not delivering a box with goods and money in it. The evidence was, that the plaintiff delivered the box to the carrier's porter, whom he appointed to receive goods for him, and told the porter, that there was a book and tobacco in the box; and in truth there was £100 in it besides. And it was agreed by the council and given in charge to the Jury, that if a box with money in it be delivered to a carrier, he is bound to answer for it, if he be robbed, although it was not told him what was in it. But Lord Chief Justice Rolle directed the Jury, that although the plaintiff did tell him of some things in the box only, and not of the money, yet he must answer for it; for he need not tell the carrier all the particulars in the box. But it must come on the carrier's part to make a special acceptance. But, in respect of the intended cheat to the carrier, he told the Jury, they might consider him in damages, notwithstanding which the Jury gave £97 against the carrier, for the money only (the other things being of no considerable value), abating £3 only for carriage. The Reporter adds: *quod durum videbatur circumstantibus*.[4] The remark of the Reporter seems well founded;

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[1] Gibbon *v.* Paynton, 4 Burr. R. 2298; 2 Kent, Comm. Lect. 40, p. 603, 604, 4th edit.; Relf *v.* Rapp, 3 Watts & Serg. R. 21.

[2] Titchburne *v.* White, 1 Str. R. 145.

[3] Tyly *v.* Morrice, Carth. R. 485; Batson *v.* Donovan, 4 Barn. & Ald. R. 21; Riley *v.* Horne, 5 Bing. R. 217; 2 Kent, Comm. Lect. 40, p. 603, 604, 4th edit.; Chicaco & Aurora Railroad *v.* Thompson, 19 Ill. 578.

[4] Kenrig *v.* Eggleston, Aleyn, R. 83. Lord Mansfield, speaking of the Re-

and it is difficult to account for the verdict of the Jury, unless upon the supposition, that they were of opinion that there was some fraud in the carrier.

§ 566. How far a bare concealment of the value of a package, without any other circumstances of a suspicious nature, ought to be deemed of itself an unfair or fraudulent concealment in cases of carriage generally, or under notices of the nature we have been considering, has been much discussed; and there has not been a perfect uniformity of judicial opinion upon the point.[1] Indeed, a question of the same nature has engaged the attention of learned jurists and casuists in ancient as well as in modern times. In relation to contracts, it has been often mooted, how far one party may innocently be silent as to any matters which may form ingredients in directing the judgment of the other contracting party. We have already had occasion to notice a diversity of judgment among the Roman lawyers, on a case where a question of this sort was incidentally presented.[2] Cicero and Pothier contend for a liberal good faith and a frank disclosure, in all cases of this sort, and found themselves upon principles of a pure and sublime morality.[3] Sir William Jones, although he gives no express opinion on the point, evidently maintains the necessity of a full disclosure of all the facts in the case of a deposit.[4] The question, however, has more commonly arisen in discussion upon contracts of sale; and it is in those cases that Cicero and Pothier have spoken with so much zeal and persuasive force.[5] In the forum of con-

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porter's note to this case, said upon one occasion: "Now, I own that I should have thought this a fraud, and I should have agreed in opinion with the *circumstantibus*." Gibbon *v.* Paynton, 4 Burr. R. 2301.

[1] Post, § 567, 568.

[2] Ante, § 75.

[3] Pothier, de Vente, n. 233 to 241; Cic. de Officiis, Lib. 3, cap. 12 to 17; 2 Kent, Comm. Lect. 39, p. 491, 4th edit.

[4] Jones on Bailm. 38, 39.

[5] This subject was a good deal discussed in Laidlaw *v.* Organ, 2 Wheaton, R. 178, 185; and Mr. Wheaton has, in his valuable report of that case, appended a long note, containing the substance of Pothier's remarks on the subject. Pothier, de Vente, n. 233 to 241. Mr. Verplanck has thought the subject worthy of a particular examination in his able "Essay on the Doctrine of

science, the question might not perhaps admit of so many doubts. But law, as a practical science, is compelled to stop short of enforcing every moral duty; and aims only at that justice, which, in the business of human life, has general convenience and certainty in its administration. In relation to sales, the doctrine now generally maintained is (as Pothier admits), that the vendor may innocently be silent as to any extrinsic circumstances equally open to both parties, which might influence the price of the commodity; but at the same time he must take care not to do or say any thing which shall tend to mislead or impose upon the other party.[1]

§ 567. In cases of common carriers, where there is no notice, the better opinion seems to be, that the party who sends the goods is not bound to disclose their value, unless he is asked.[2] But the carrier has a right to make the inquiry, and to have a true answer; and if he is deceived, and a false answer is given, he will not be responsible for any loss.[3] If he makes no inquiry, and no artifice is made use of to mislead him, then he is responsible for any loss, however great the

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Contracts" (1825). Mr Chancellor Kent has discussed the subject with his usual fulness of learning and accuracy of research, and has vindicated the present state of the law from any just reproach, as founded in practical sense and general convenience. 2 Kent, Comm. Lect. 39, p. 488, to 492, 4th edit.

[1] Laidlaw *v.* Organ, 2 Wheat. R. 178; 2 Kent, Comm. Lect. R. 39, p. 488, 491, 4th edit. See also, Etting *v.* Bank of U. S. 11 Wheat. R. 59; Pidcock *v.* Bishop, 3 Barn. & Cress. R. 605; Smith *v.* Bank of Scotland, 1 Dow, Parl. R. 272; Relf *v.* Rapp, 3 Watts & Serg. R. 21.

[2] Jones on Bailm. 105; 2 Kent, Comm. Lect. 40, p. 603, 604, 4th edit.; Brooke *v.* Pickwick, 4 Bing. R. 218; Phillips *v.* Earle, 8 Pick. R. 182; Orange County Bank *v.* Brown, 9 Wend. R. 25, 115; Hollister *v.* Nowlen, 19 Wend. R. 234; Cole *v.* Goodwin, 19 Wend. R. 251; Kenrig *v.* Eggleston, Aleyn, R. 93. See Richards *v.* Westcott, 2 Bosw. 605; Walker *v.* Jackson, 10 Mees. & Welsb. R. 160, 168. In this case Parke, B., said: "I take it now to be perfectly well understood, according to the majority of opinions upon the subject, that, if any thing is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary. If he ask no questions, and there be no fraud to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel as it is." See also, Camden & Amboy Railroad Co. *v.* Baldauf, 4 Harris (Penn.), R. 68.

[3] 2 Kent, Comm. Lect. 40, p. 603, 604, 4th edit.

value may be.[1] [And in a late case in England, it was declared not true that a carrier has a right, in every case and under all circumstances, to know the contents of packages tendered him to be carried;[2] and if he refuse to carry, merely because the consignor refuses to tell him the contents, he is liable.]

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[1] Kenrig *v.* Eggleston, Aleyn, R. 93; Morse *v.* Slue, 1 Vent. R. 238; Tyly *v.* Morrice, Carth. R. 485; Titchburne *v.* White, 1 Str. R. 145; Gibbon *v.* Paynton, 4 Burr. R. 2298; Riley *v.* Horne, 5 Bing. R. 217; Batson *v.* Donovan, 4 Barn. & Ald. 21; Brooke *v.* Pickwick, 4 Bing. R. 218; Phillips *v.* Earle, 8 Pick. R. 182.

[2] [In Crouch *v.* The London & N. W. Railway Co. 14 C. B. 255; 25 Eng. Law and Eq. R. 287, Maule, J., said: "Then with respect to the fifty-seventh plea, it states that the parcel was a packed parcel: that the defendants asked the plaintiff what the contents of the parcel were; that the plaintiff then refused to tell them, and that because he did not know and could not tell them the contents of the parcel they refused to take the parcel, as they lawfully might do. Now, to consider the goodness of that plea, issue being joined on it, I conceive that the allegation, that 'because they did not know the contents of the parcel,' is an allegation both that they did not know the contents, and that they refused to carry for that cause. They say, 'we refused to carry the parcel because we did not know the contents, and let that be taken as the cause of our refusal.' That is, as I understand it, the plea, and it is favorable to the defendants so far. But in order to sustain this plea, as the plaintiff's counsel has observed, we must hold, that in all cases whatever, the carrier has a right to ask the person who brings the parcel what the contents are, and, if he is not informed, that he may refuse to carry it. There is no authority to support that. There are dicta of Best, C. J., but I conceive that there is nothing amounting to an authority on the subject, and it is a proposition which is untenable in its generality, or rather universality, seeing the extent to which it would necessarily lead if this plea were a good one. In order to make it a good plea, it ought to have alleged some ground why the defendants made that inquiry. If they do not suggest any, it must be considered that there is no special ground.

"Now, there is no doubt that if there is any deception, or any improper package sent by the plaintiff, the defendants are not liable for a damage arising to it; and if there is any deception as to the value, the defendants are not liable. As to that, the defendants are competent to limit, and they do limit by their notice, their liability with respect to certain valuable commodities; and with respect to dangerous articles, there is provision made that they may examine the parcel if they think fit, and whenever there is a good reason to suspect the contents they may either insist on being informed of the nature of them, or, if the information is refused, they may say, 'then we must open it ourselves,' or 'we will not take it;' but it cannot be maintained, that in all cases the carrier may require the person to give him a full description of every article in it. On these

§ 568. There has been some question, whether the same rule applies to cases of notices. Mr. Justice Best, in Batson *v.* Donovan,[1] was of opinion, that the same rule does not apply in cases of notices; and to that opinion he has at all times strenuously adhered.[2] On the contrary, the three other Judges who sat in that case thought, that, in cases of notices, the party who sends the goods without payment for the extraordinary value, holds them out, impliedly, as articles of ordinary value; and consequently he perpetrates a fraud upon the carrier, who is thus induced not to bestow upon them the care and diligence which their extraordinary value would require; and under such circumstances the contract itself becomes a nullity.[3] A distinction, however, has since been suggested by the Court in another and later case, namely, that the carrier will, notwithstanding, be liable for any malfeasance, or for a wrong delivery, although he will not be liable for any negligence, however gross.[4] In the latest case on the subject, in which a very elaborate judgment was pronounced by Lord Chief Justice Best, the inclination of the Court in the general reasoning seems to be, that the carrier is bound to make the inquiry, although there is a notice.[5] The point, however, was not directly in judgment. In another case, the same Court has held, that a passenger in a coach is not bound to disclose the value of his baggage, notwithstanding the carrier has published a notice.[6]

§ 569. However, then, the doctrine may be in cases of no-

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grounds, I think this plea, which sets out the ground of refusal, is invalid in law, and that the plaintiff is entitled to our judgment."]

[1] 4 Barn. & Ald. R. 27.

[2] Garnett *v.* Willan, 5 Barn. & Ald. 53, 63; Riley *v.* Horne, 5 Bing. R. 217; Brooke *v.* Pickwick, 4 Bing. R. 218; Sleat *v.* Fagg, 5 Barn. & Ald. R. 342; Bignold *v.* Waterhouse, 1 Maule & Selw. R. 261.

[3] Batson *v.* Donovan, 4 Barn. & Ald. R. 21. See also, Orange County Bank *v.* Brown, 9 Wend. R. 85, 115.

[4] Sleat *v.* Fagg, 5 Barn. & Ald. R. 312. See also, Nicholson *v.* Willan, 5 East, R. 507; Dwight *v.* Brewster, 1 Pick. R. 50.

[5] Riley *v.* Horne, 5 Bing. R. 217.

[6] Brooke *v.* Pickwick, 4 Bing. R. 218. See Orange County Bank *v.* Brown, 9 Wend. R. 85, 115.

tices, as to the duty of inquiry on the one side, and of non-concealment on the other, all the authorities are agreed, that, if any deception is intentionally practised, the fraud avoids the contract.[1] But a case may exist, where the goods are of an extraordinary value, and not paid for as such; and yet the circumstances may lead to the conclusion, that the carrier has either a direct or presumptive knowledge, that they exceed the common value, and, therefore, that no fraud is in fact perpetrated upon him. Under such circumstances, the question may be presented, whether, the terms of the notice not being complied with, the carrier is answerable for their loss. The Court of King's Bench have held, that the carrier is not, under such circumstances, responsible for any loss by theft, the goods not having been exposed by him to more than the ordinary risk. On that occasion the Court said, that there is no incongruity in a carrier's engaging to place goods in a course of conveyance, and declaring at the same time, that he will not be answerable for the loss of them; and upon the terms of the notice, if the carrier had delivered the goods in question, he would not have been entitled to more than the common compensation for the carriage of goods, exclusive of the risk of loss.[2] There are antecedent cases, which seem to look the other way.[3] Whether those cases are now to be deemed wholly overruled, or not, may, perhaps, be thought to deserve further inquiry. The doctrine, however, clearly does not apply to any case where there has been a waiver of the notice.

§ 570. Fifthly. The degree of liability, which is imposed upon the carrier, notwithstanding such notices. In the first place, it is clear that such notices will not exempt the carrier from any losses by the malfeasance, misfeasance, or gross negligence of himself or his servants.[4] [Although the contrary is

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[1] Ante, § 567.

[2] Marsh *v.* Horne, 5 Barn. & Cress. R. 322. See also, Harris *v.* Packwood, 3 Taunt. R. 264; Levi *v.* Waterhouse, 1 Price, R. 280; Thorogood *v.* Marsh, 1 Gow, R. 105; Alfred *v.* Horne, 3 Stark. R. 136.

[3] Beck *v.* Evans, 16 East, R. 244; s. c. 3 Camp. R. 267; Down *v.* Fromont, 4 Camp. R. 40. But see Brooke *v.* Pickwick, 4 Bing. R. 218; 1 Bell, Comm. p. 475, 5th edit.

[4] 2 Kent, Comm. Lect. 40, p. 606, 607, 4th edit.; Owen *v.* Burnett, 2 Cromp.

now held in England as to special contracts.[1]] If, therefore, he or they convert the goods to a wrong use;[2] if he or they make a wrong delivery to a person not entitled to them;[3] or if he or they are guilty of gross negligence in the carriage or care of them, the loss must be borne by the carrier, notwithstanding his notice;[4] for the terms are uniformly construed not to exempt him from such losses.[5] What constitutes gross negligence, or whether there is in cases of this sort any real distinction between negligence and gross negligence, has been a matter of some judicial doubt and discussion, and perhaps the doctrine cannot now be stated with any absolute precision.[6]

& Mees. R. 353; Beckman *v.* Shouse, 5 Rawle, R. 179, 189, and the cases cited in the note below; Hollister *v.* Nowlen, 19 Wend. R. 234; Cole *v.* Goodwin, 19 Wend. R. 251, 361; Smith on Merc. Law, B. 3, ch. 2, p. 233 to 338, 2d Lond. edit. 1838; Camden and Amboy Railroad Co. *v.* Burke, 13 Wend. R. 611, 627, 628; Ante, § 450, 545 *b*; Hinton *v.* Dibbin, 2 Adolph. & Ellis (N. S.), R. 646, 659. See an elaborate article on "Carriers' Notices," in the Boston Law Rep. Sept. 1852.

[1] Ante, § 549 *a*.

[2] Ante, § 545 *b*; Post, § 570.

[3] Ante, § 545 *b*; Post, § 570.

[4] See Penn. Railroad Co. *v.* McCloskey, 11 Harris (Penn.), R. 526.

[5] Beck *v.* Evans, 16 East, R. 244; Smith *v.* Horne, 8 Taunt. R. 144; Bodenham *v.* Bennett, 4 Price, R. 31; Birkett *v.* Willan, 2 Barn. & Ald. R. 356; Garnett *v.* Willan, 5 Barn. & Ald. R. 53; Sleat *v.* Fagg, 5 Barn. & Ald. R. 342; Ellis *v.* Turner, 8 Term R. 531; Lyon *v.* Mells, 5 East, R. 439; Duff *v.* Budd, 3 Brod. & Bing. R. 177; Owen *v.* Burnett, 2 Cromp. & Mees. R. 353; s. c. 4 Tyrwh. R. 143; Ante, § 450, 545 *b*, 561; 1 Bell, Comm. p. 572 to 475, 5th edit.; 1 Bell, Comm. § 404, 405, 406, 410.

[6] See Wilson *v.* Brett, 11 Mees. & Welsb. R. 113; The Steamboat New World *v.* King, 16 How. (U. S.) R. 474; Austin *v.* Manchester, &c., Railway Co. 11 Eng. Law and Eq. R. 513; Ante, § 17 and note. Lord Denman, in delivering the opinion of the Court in Hinton *v.* Dibbin (2 Ad. & Ell. (N. S.), R. 646, 649), said: "In the first place, then, it had been decided by all the Courts, that a carrier is liable for the loss of articles above the amount mentioned in the usual notice, though not paid for accordingly, where he is guilty of what, in so many cases, is called 'gross negligence.' This was the precise point decided in the Exchequer in the case of Bodenham *v.* Bennett, a case often cited and relied upon in support of this doctrine. There the usual notice had been given, and the parcel lost was of much greater value than the sum mentioned in that notice. The like decision took place in the Court of Common Pleas, under similar circumstances, in the case of Smith *v.* Horne, the Chief Justice reporting that the *only* question submitted to the Jury was,

§ 571. But an inquiry may be made, whether the carrier will not be liable also for ordinary negligence, as well as for

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whether the carrier had been guilty of gross negligence; and that direction was sustained by the Court. And in this Court also, in the case of Birkett *v.* Willan, a new trial was granted expressly upon the ground that Lord Tenterden had omitted to inform the Jury that the carrier would be liable for gross negligence, though in that case also the usual notice was proved, and the value of the goods lost much exceeded the amount therein specified. It is true that, in the case of Batson *v.* Donovan, where a parcel of banker's notes of the value of £4,000 and upwards was delivered to a carrier, without any communication of its contents, the learned Judge who tried the cause left two questions to the Jury, the first being, whether the plaintiffs dealt fairly by the defendants in not apprising them that the box contained articles of value; and the verdict found for the defendants upon that direction was supported. But the Court was not unanimous in the decision; and the dissenting Judge differed, mainly, because he considered the leaving such preliminary question in favor of the carrier to be a novelty, and unwarranted by any authority. And in the cases already mentioned (there being many others to the same effect), no such point was made; but the only question was whether there was gross negligence in the carrier. In a subsequent case in this Court, Sleat *v.* Fagg, the carrier was held liable for the loss of a parcel of great value, notwithstanding the usual notice by him, and want of notice to him. That case undoubtedly was decided chiefly upon the ground of 'misfeasance,' as before explained. But, as it was impossible to impute to the carrier a wilful purpose of destroying or losing the parcel, it seems difficult to distinguish the case *in kind* from others, where negligence, more or less in amount, has been the cause of the loss, and the carrier has been held liable accordingly. It surely bears no resemblance to the instance of 'misfeasance' put by Mr. Baron Bayley in the case of Owen *v.* Burnett, which is dashing a package of glass against the ground. At all events, such a case may well be supposed to have been in the contemplation of the legislature when passing an act expressly for the purpose (as we shall see presently) of relieving carriers from responsibility.

"Again, when we find 'gross negligence' made the criterion to determine the liability of a carrier who has given the usual notice, it might perhaps have been reasonably expected that something like a definite meaning should have been given to the expression. It is believed, however, that in none of the numerous cases upon this subject is any such attempt made; and it may well be doubted whether between 'gross negligence' and negligence merely any intelligible distinction exists. But without negligence of some kind, it is not very easy to suppose how a loss for which the carrier is liable can take place; and, if so, his protection from the notice, before the statute, was of a very precarious description. In the before-cited case of Owen *v.* Burnett, Bayley, B., thus expresses himself: 'As for the cases of *what is called* gross negligence, which throws upon the carrier the responsibility from which, but for that, he

gross negligence, notwithstanding such notices. That point does not appear until recently to have undergone any solemn and positive adjudication. There are *dicta* by various Judges, indicating that the common rule of ordinary diligence, in the common cases of hire, is applicable to the case of carriers under notices.[1] On the other hand, there are declarations of the Judges at *nisi prius*, as well as their opinions in *banc*, which seem to put it as a question of gross negligence, or not.[2] The

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would have been exempt, I believe that in the greater number of them it will be found that the carrier was guilty of misfeasance.' From this language of the learned Judge, it is difficult to understand him otherwise than as not being satisfied as to the meaning and import of the words, or the effect attributed to them to fix the carrier with liability.

"The latest case bearing upon this part of the subject, the state of the law at the time of passing the act, is that of Wyld *v.* Pickford; that act, it must be observed, not having been at all under the consideration of the Court. In a prepared judgment, however, delivered by Parke, B., there are the following observations: 'Upon reviewing the cases on this subject' (what circumstances may make a carrier responsible after the usual notice), 'the decisions and dicta will not be found altogether uniform, *and some uncertainty still remains* as to the true ground on which cases are taken out of the operation of these notices. In Bodenham *v.* Bennett, Mr. Baron Wood considers that these notices were introduced for the purpose of protecting carriers from *extraordinary* events, and not meant to exempt them from due and ordinary care. On the other hand, in some cases it has been said that the carrier is not by his notice protected from the consequences of *misfeasance* (Lord Ellenborough, in Beck *v.* Evans); and that the true construction of the words "lost or damaged," in such a notice, is, that the carrier is protected from the consequences of negligence or misconduct in the carriage of goods, but not if he divests himself wholly of the charge committed to his care, and of the character of carrier. In many other cases it is said he is still responsible for "gross negligence;" but in some of them that term has been defined in such a way as to mean *ordinary* negligence (Story on Bailments, § 11), that is, the want of such care as a prudent man would take of his own property. *The weight* of authority seems to be in favor of the doctrine, that, in order to render a carrier liable after such a notice, it is not necessary to prove a total abandonment of that character, or an act of wilful misconduct, but that it is enough to prove an act of *ordinary* negligence—*gross* negligence, in the sense in which it has been understood in the last mentioned cases.'"

[1] Bodenham *v.* Bennett, 4 Price, R. 31; Smith *v.* Horne, 8 Taunt. R. 144; Batson *v.* Donovan, 4 Barn. & Ald. R. 21, per Best, J.; 1 Bell, Comm. p. 472 to 475, 5th edit.; 1 Bell, Comm. § 494, 405, 406, 4th edit.

[2] Riley *v.* Horne, 5 Bing. R. 217; Batson *v.* Donovan, 4 Barn. & Ald. R. 21;

question may, however, be now considered at rest, by an adjudication entirely satisfactory in its reasoning, and turning upon the very point, in which it was held, that in cases of such notices, the carrier is liable for losses and injuries occasioned, not only by gross negligence, but by ordinary negligence; or, in other words, the carrier is bound to ordinary diligence.[1]

Brooke *v.* Pickwick, 4 Bing. R. 218; Lowe *v.* Booth, 13 Price, R. 329. See also, the remarks of Mr. Baron Bayley, in Owen *v.* Burnett, 2 Cromp. & Mees. R. 353, 359, 360; s. c. 2 Tyrwh. R. 143.

[1] Wyld *v.* Pickford, 8 Mees. & Welsb. 461. Mr. Baron Parke, in delivering the opinion of the Court, said: "What circumstances may make the defendants responsible after such a notice, whether ordinary negligence, or gross negligence, or wilful misfeasance, is a question which need not have been determined on the demurrer to the third plea. But on that to the fifth it is necessary, for if any conversion by non-delivery, or a negligent conversion, would be a misfeasance, for which the defendants would be liable notwithstanding the notice, the plea would be bad; if a mere inadvertent conversion, it would not.

"Upon reviewing the cases on this subject, the decisions and dicta will not be found altogether uniform, and some uncertainty still remains as to the true ground on which cases are taken out of the operation of these notices. In Bodenham *v.* Bennett (4 Price, 34), Mr. Baron Wood considers that these notices were introduced for the purpose of protecting carriers from extraordinary events, and not meant to exempt them from due and ordinary care. On the other hand, in some cases it has been said, that the carrier is not by his notice protected from the consequences of misfeasance (Lord Ellenborough, in Beck *v.* Evans, 16 East, 247); and that the true construction of the words 'lost or damaged,' in such a notice, is, that the carrier is protected from the consequences of negligence or misconduct in the carriage of goods, but not if he divests himself wholly of the charge committed to his care, and of the character of carrier. Bayley and Holroyd, Js., in Garnett *v.* Willan (5 Barn. & Ald. 57, 60). In many other cases it is said he is still responsible for 'gross negligence;' but in some of them that term has been defined in such a way as to mean ordinary negligence (Story on Bailments, § 11), that is, the want of such care as a prudent man would take of his own property. Best, J., in Batson *v.* Donovan (4 Barn. & Ald. 30), and Dallas C. J., in Duff *v.* Budd (3 Brod. & B. 182). The weight of authority seems to be in favor of the doctrine, that, in order to render a carrier liable after such a notice, it is not necessary to prove a total abandonment of that character, or an act of wilful misconduct, but that it is enough to prove an act of ordinary negligence, — gross negligence, in the sense in which it has been understood in the last-mentioned cases; and that the effect of a notice, in the form stated in the plea, is, that the carrier will not, unless he is paid a premium, be responsible for all events (other than the act of God and the Queen's enemies) by which loss or damage to the owner may arise, against

§ 571 *a*. But, at all events such notices will not exempt the carrier from responsibility for losses occasioned by a defect in the vehicle or machinery used for the transportation; for there is a breach of the implied warranty, in such cases, that the vehicle or machinery shall be in good order or condition, and fit for the business or employment; and it will amount to negligence if they are not in such condition, and the carrier might, by the exercise of proper diligence, have ascertained it.[1] The doctrine has been pressed even further; and it has been held, that if the defect in the vehicle or machinery is unknown to the carrier, and is not discoverable on inspection, and the loss happens without any culpable negligence or want of care of the carrier, or his agents, and there is a notice, that "all baggage is at the risk of the owner," the carrier will, notwithstanding, be liable for any loss occasioned to the baggage by a defect of the vehicle or machinery.[2] The ground of the decision seems to be, that the notice does not apply to this implied warranty of road-worthiness; and that the general liability of carriers for all losses, not occasioned by the act of God or the public enemy, governs in such cases.[3]

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which events he is by the common law a sort of insurer; but still he undertakes to carry from one place to another, and for some reward in respect of the carriage, and is therefore bound to use ordinary care in the custody of the goods, and their conveyance to and delivery at their place of destination, and in providing proper vehicles for their carriage; and after such a notice, it may be that the burden of proof of damage or loss by the want of such care would lie on the plaintiff. But a misdelivery of a parcel, although it is a conversion, according to the doctrine in Youl *v.* Harbottle (Peake, N. P. C. 49), because it is the giving the dominion over the goods to another, is not necessarily a proof of want of ordinary care, still less of gross negligence, if that word is to be understood as meaning a greater want of care; it may have been an act done by a careful person, who has been deceived by an artifice calculated to circumvent the most careful person." And see Graham *v.* Davis, 4 Ohio St. R. 362.

[1] Camden and Amboy Railroad, &c., Co. *v.* Burke, 13 Wend. R. 611, 627, 628. See also, Lyon *v.* Mells, 5 East, R. 428; Sharp *v.* Grey, 9 Bing. R. 457; Welsh *v.* Pittsburgh Railway Co. 10 Ohio St. R. 65. But see Chippendale *v.* Lancashire & Yorkshire Railway Co. 7 Eng. Law and Eq. R. 395; Ante, § 509, 562; Post, § 592.

[2] Camden and Amboy Railroad, &c. Co. *v.* Burke, 13 Wend. R. 611, 627, 628. See also, Lyon *v.* Mells, 5 East, R. 428; Sharp *v.* Grey, 9 Bing. R. 457; Ante, § 509, 562; Post, § 592.

[3] Ibid.

§ 572. Sixthly. What amounts to a waiver of the notice. In some of the cases cited under a former head,[1] it seems to have been thought, that the mere receipt of goods, whose apparent value was beyond the sum in the notice, without any extra payment therefor, was a waiver of the notice.[2] But the later doctrine seems to exclude any presumption founded merely upon the knowledge of that fact, and requires some auxiliary circumstance to support it.[3] If, however, the carrier is told what is the value of the goods, and he is directed to charge what he pleases, and he chooses to charge only the ordinary hire, it is a waiver of the notice as to the goods.[4] So, an express agreement to carry a package of extraordinary value for the common hire, will be a waiver of the notice, even if made by one partner only, if it be within the scope of his authority.[5]

§ 573. This head respecting notices may be concluded by stating, that in cases of notice the burden of proof of negligence is on the party who sends the goods, and not of due diligence on the part of the carrier; which is contrary to the general rule in cases of carriers where there is no notice.[6]

[§ 573 *a*. The rights and duties of railway carriers has been much affected in England by recent statutory Enactments, the most important of which, passed in 1854, called the "Railway and Canal Traffic Act," is here inserted, with references to some decisions upon it.

Section first merely defines the meaning of the phrases: "The Board of Trade," "Traffic," "Railway," "Canal," "Railway Company," "Canal Company," "Railway and Canal Company."

Section second provides, that every railway company, &c.,

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[1] Ante, § 567, 568, 569.

[2] Beck *v.* Evans, 16 East, R. 244; Down *v.* Fromont, 4 Camp. R. 40; Brooke *v.* Pickwick, 4 Bing. R. 218; Ante, § 563, 567, 568, 569.

[3] Marsh *v.* Horne, 5 Barn. & Cress. R. 322.

[4] Evans *v.* Soule, 2 Maule & Selw. R. 1; Wilson *v.* Freeman, 3 Camp. R. 527.

[5] Helsby *v.* Mears, 5 Barn. & Cress. R. 504.

[6] Marsh *v.* Horne, 5 Barn. & Cress. R. 322, 327; Riley *v.* Horne, 5 Bing. R. 217, 226; Ante, § 529. See also, Ante, § 410, 454, 457.

shall, according to their respective powers, afford all reasonable facilities[1] for the receiving, and forwarding, and delivering of traffic upon and from the several railways and canals, belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference[2] or advantage to or in favor of any particular person or

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[1] [A railway company charged 3*s.* per day, for demurrage for every wagon detained more than four days off the line: the complainant demanded that the company should provide trucks and wagons for the carriage of his coal and coke, but refused to pay demurrage for their detention, beyond the time allowed by the regulations of the company. It was held that the company were justified in refusing to furnish them: and that the company could not be called upon to carry coals to the extremity of their line (where it joined the midland railway), and there shift them into other trucks or wagons, they having no convenience at that place for that purpose, and not affording such facility to any other person; and that the company were not common carriers of coal. Oxdale *v.* North-eastern Railway Co. 1 C. B. (N. S.), 454.]

[2] [To constitute an "undue or unreasonable preference," within this act, by reason of an inequality of charge, it must be an inequality in the charge for travelling over the *same* line, or the *same portion* of the line. *In re*, Caterham Railway Co. 1 C. B. (N. S.), 410. In dealing with this section, the fair interests of the company are to be taken into account. Ransome *v.* Eastern Counties Railway Co. 1 C. B. (N. S.), 437. A railway company made an agreement with A, to carry for him a large quantity of coals during three years, from Peterborough to various places on their lines of railway, at certain rates. B sent coals from Ipswich (which had been brought to that port by sea), to various places on the same lines of railway; and the company charged him a much larger sum per ton, in proportion to the distance over which his coals were carried, than they charged to A, — the professed object being to enable A (whose coal came to Peterborough by railway), to compete in the coal trade of the district with B, who had the advantage of having his coal brought to Ipswich by sea: — Held, that this was giving "an undue preference" to it. Ransome *v.* Eastern Counties Railway Co. 1 C. B. (N. S.), 437. *Quære*, whether a railway company may not charge different rates, where coals are carried in large and small quantities, and long and short distances, and where the difference is for the purpose of competing with another line, and where one party uses his own wagons, and the other uses those of the company.

A railway company charged certain rates for the carriage of coke and coals over their lines, from which no variation was made to any one, except in the case of coals carried by it in conjunction with another railway company, through from the collieries to London, the former company's haulage ceasing where their railway joined that of the latter company; such coal being made

company, or any particular description of traffic, in any respect whatsoever; nor shall any such company subject any particular

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up into full trains, and the wagons for the entire distance being provided by the latter company, a lower rate for the whole distance was charged, — the circumstances of the coals so carried, being carried in entire trains, and at regular times, and without stoppages, enabling the company to carry them at such lower rate: — Held, that it was sufficiently made out, that the circumstances stated enabled the company to carry such coals at a cost less to them than the cost of carrying coals and coke for the complainant, and that by carrying them, under the circumstances stated, at such lower rate, no undue or unreasonable preference was given, or any undue or unreasonable disadvantage imposed. Oxlade *v.* North-eastern Railway Co. 1 C. B. (N. S.), 454.

But where a similar arrangement was made with another company, under different circumstances, the inducement on the part of the first company being to *introduce the northern coke into Straffordshire:* — Held, that lowering the rates *for that purpose*, was giving an undue preference to that particular traffic, there being no special circumstances affecting the pecuniary interests of the company to justify the course pursued. Oxlade *v.* North-eastern Railway Co. 1 C. B. (N. S.), 454.

A railway company ascertained, as nearly as possible, the quantity and sort of coal consumed in the neighborhood of each station, and entered into terms with the collieries, having that particular description of coal, to supply the required quantity; and they appointed a depot agent to manage the sale of the coals so supplied, through whom orders were transmitted to the collieries, and who accounted to the colliery owners for the proceeds, and to whom all the depots were allotted; all coal dealers were treated alike. The company adopted this course for the purpose of preventing any obstruction of the general traffic of the railway: — Held, that this was not giving an undue or unreasonable preference or advantage to or in favor of any particular person or company, or subjecting any particular person or company, or particular description of traffic, to any undue or unreasonable prejudice or disadvantage. Oxdale *v.* North-eastern Railway Co. 1 C. B. (N. S.), 454.

A railway company made arrangements, at one of their stations, with A., the proprietor of an omnibus running between the station and K., to provide omnibus accommodation for all passengers, by any of their trains to and from K., and allowed A. the exclusive privilege of driving his vehicle into the station yard, for the purpose of taking up and setting down passengers at the door of the booking-office: — Held, that in the absence of special circumstances, showing it to be reasonable, the granting of such exclusive privilege to one proprietor, and refusing to grant the like facilities to another, who also brought passengers from K. as well as from other places beyond, was a breach of this prohibition against undue and unreasonable preferences. Marriott *v.* London & South-western Railway Co. 1 C. B. (N. S.), 499. But in Beadell *v.* Eastern Counties Railway Co. 2 C. B. (N. S.), 509, where a railway company agreed

person or company, or any particular description of traffic, to any undue or unreasonable prejudice[1] or disadvantage, in any

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with a cab proprietor, in consideration of his paying them £600 per annum, to allow him the exclusive liberty of plying for hire within their station; the Court refused to grant a writ of injunction against the company under this act, at the instance of another cab proprietor; no inconvenience to *the public* being shown to have arisen from the arrangement. In this case Williams, J., says: "The public decision in Marriott's case, rests expressly upon the inconvenience inflicted upon *the public*, not upon the particular grievance to the applicant." See also, Painter *v.* London, Brighton, &c. Railway Co. 2 C. B. (N. S.), 702. A railway company possessed of a line from B. to C., advertised to convey goods from A. to C. (in conjunction with another company), at the rate of 50*s.* per ton, *provided they were consigned by and to their own agents, at those respective places;* but if consigned to any one else, they charged 2*s.* 6*d.* per ton more. Held, ground for injunction under this act, Baxendale *v.* North Devon Railway Co. 3 C. B. (N. S.), 324. And the rule was made absolute *with costs*, although it prayed a writ enjoining the company to charge an equal rate for the carriage from A. to C., and the writ was granted as from B. to C. only. Baxendale *v.* North Devon Railway Co. 3 C. B. (N. S.), 321. It seems that both companies ought to have been brought before the court by the rule. Baxendale *v.* North Devon Railway Co. 3 C. B. (N. S.), 324. A railway company agreed with the lessees of certain collieries, to carry their coals at a somewhat lower rate of tonnage than they carried for others, in consideration of the owner of those collieries having laid out a large sum in constructing tram-ways to connect them with the railway; they also made a further reduction, under the influence of a threat, that, unless they acceded to the terms proposed by the lessees, the owner would construct another line of railway direct from the collieries to the place of shipment, for the use of his tenants, and so would divert

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[1] [A railway company has no right to impose a charge for the conveyance of goods to or from their station, when the customer does not require such service to be performed by them. Garton *v.* Bristol and Exeter Railway Co. 6 C. B. (N. S.), 639. The B. and E. Railway Co. closed their goods station at 5.15, P. M., against all persons except their agent W., who had a receiving-house about a mile distant from the station, and from whom the company received goods up to 8, P. M. For the conveyance of goods from the receiving-house to the station, W. charged 1*s.* 8*d.* per ton, on all goods above 3 cwt., and 3*d.* for each package below that weight: — Held, upon the complaint of a rival carrier, that the refusal to receive goods after 5.15, unless sent through the receiving-house of W., was imposing upon him an undue prejudice, within this section — although it was sworn, on the part of the company, that the goods so brought to the station by W., came there properly classified, weighed, and prepared for loading. Garton *v.* Bristol & Exeter Railway Co. 6 C. B. (N. S.), 639.]

respect whatsoever; and every railway company, and canal company, and railway and canal company, having or working rail-

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from the company a very considerable and essential portion of their traffic. Held, that neither of these was a justifiable reason for the "undue preference" thus given. Harris *v.* Cockermouth & Workingham Railway Co. 3 C. B. (N. S.), 693. The Court refused to grant a rule for an injunction under this act, against a railway company, to compel them to issue season tickets between Colchester and London on the same terms as they issued them between Harwich and London, — upon a mere suggestion that the granting the latter (the distance being considerably greater) at a much lower rate than the former, was an undue and unreasonable preference of the inhabitants of Harwich over those of Colchester. Jones *v.* Eastern Counties Railway Co. 3 C. B. (N. S.), 718.

Though limited to a *reasonable* charge, there is no common-law obligation on a carrier to charge *equal* rates of carriage to all his customers. Baxendale *v.* Eastern Counties Railway Co. 4 C. B. (N. S.), 63.

A railway company established a system of carrying coals according to assigned districts, comprising certain places on their lines and branches, carrying them within those districts at certain lower rates, for established quantities not less than a "train load" of 200 tons. The complainants, who were coal dealers at Ipswich, carried on that business at five places on that branch of the company's lines, which conducts to Peterborough, also at two places on another branch communicating with the first mentioned, and also at a place on another distinct branch. The districts were so adjusted, that these places were distributed into three of them, so that in order to take advantage of the reduced rates, the complainants would have to send from Ipswich three full "train loads," which was a larger quantity than they could profitably send to those districts; and thus they sustained great injury, whereas, the Peterborough dealers, by reason of one district embracing *seven* places at which the complainants dealt, were enabled to send their coals in such quantities as to avail themselves of the reduction. It being sworn, on the part of the company, that these districts were adjusted, not with a view to give an undue preference to one set of dealers over the other, but solely with regard to their own convenience, and the wants of the neighborhood, it was held, that the complaint was not sustained. Ransome *v.* Eastern Counties Railway Co. 4 C. B. (N. S.), 135.

The scale of charges made by a railway company for the carriage of coals from Peterborough and Ipswich respectively to various places, had the effect of diminishing the natural advantages which the Ipswich dealers possessed over those of Peterborough, from their greater proximity to those places, by annihilating (in point of expense of carriage), in favor of the latter, a certain portion of the distance between Peterborough and those places. Held to be an undue preference to the Peterborough dealers over those of Ipswich. Ransome *v.* Eastern Counties Railway Co. 4 C. B. (N. S.), 135.

A railway company had been in the habit of unloading goods, coming by their railway from the Southampton Docks, consigned to carriers in London,

ways or canals, which form part of a continuous line of railway or canal, or railway and canal communication, or which have

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out of their trucks and of placing them (by their servants) in, or conveniently near to the wagons of the consignees, without any extra charge. This practice they discontinued, refusing to allow their servants to unload trucks without an extra charge for such service, except in the case of P., whose goods they continued to unload as before; the smallness of their quantity, and the fact of their being carried intermixed with the company's own traffic, rendering it (as they alleged), more convenient for themselves so to do. C., however, another carrier, was denied the aid of the company's servants in the unloading of his goods of the same description, and coming from the same place, the company alleging that the same reasons did not apply to his goods as to P.'s, inasmuch as the former came in larger quantities, and in separate trucks. The Court refused to make absolute a rule enjoining the company to unload the trucks containing C.'s goods, and to deliver such goods to C., by placing the same in or adjoining to his wagons, holding the demand to be too large. But they intimated, that if C.'s complaint had been confined to the company's giving an advantage to P. in the unloading of his goods, which they withheld from him, C. might have been entitled to relief under this statute. Cooper *v.* London & North-western Railway Co. 4 C. B. (N. S.), 738.

It is not a legitimate ground for giving a preference to one of the customers of a railway company, that he engages to employ other lines of the company for the carriage of traffic distinct from and unconnected with the goods in question; and it is undue and unreasonable to charge more or less for the same service, according as the customer of the railway thinks proper, or not to bind himself to employ the company in other and totally distinct business. Baxendale *v.* Great Western Railway Co. 5 C. B. (N. S.), 309. The complainants were common carriers from Bristol to London, using for that purpose the Great Western Railway. They were also common carriers from Bristol to various other places, using for that purpose lines in rivalry with the Great Western lines, other than that from Bristol to London. T., a paper-maker near Bristol, who was in the habit of sending large quantities of paper to London, and also to the other places before mentioned, prior to August, 1857, employed the complainants to carry his paper to London and deliver it there; and the complainants employed the company to carry it on their railway, from the station at Bristol (where it was delivered by S.) to the station at Paddington, whence it was carted by the complainants to its destination in London. In August, 1857, the company raised their charge from 22*s.* 1*d.* per ton, being their rate for first class goods, less the cartage at Bristol and London, to 35*s.* per ton, that being their rate for third class goods, less cartage. The complainants in consequence made a proportionate increase in their charge to S., who objected to it. The company declined to alter this charge, but they subsequently agreed with S. to carry his paper to London from the station at Bristol for 23*s.* 4*d.* per ton, *including cartage from Paddington*, — in order, as the complainants alleged, to

the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reason-

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induce S. to send his paper through them, instead of through the complainants as formerly. Upon a motion for an injunction under this act, the company sought to justify this preference by alleging, that they carried for S. upon the terms of a special agreement, containing stipulations so much to their advantage as to be worth the whole difference of charge; that the rate of 23*s.* 4*d.* per ton was agreed upon for paper between Bristol and London (to include cartage in London but not at Bristol); that paper carried at that rate was to be at the risk of S., who was also to send all other goods he had to send at the ordinary rates, by the company, and also to send all his goods (including paper), which were going to any place to which the company carried, by them; and that it was a great gain to the company, and a fair equivalent for the difference of charge upon the goods carried from Bristol to London, to have the advantage which they derived by securing the whole of S.'s traffic, or that in which he had any interest or could influence to the north of England and elsewhere upon their lines other than between Bristol and London, together with the advantage of the goods being carried from Bristol to London at S.'s risk. Held, that the advantages thus stipulated for were wholly distinct from, and did not affect, the price or profit of the carriage from Bristol to London, and ought not to be taken into account in determining the charge for such carriage; and, consequently, that the complainants were entitled to relief. Baxendale *v.* Great Western Railway Co. 5 C. B. (N. S.), 309.

The court has a right, under this act, to interfere to prevent a railway company from fixing the rate of tolls to be taken on the railway with a view to the promotion of their own interests, when their so doing subjects others to unreasonable disadvantage, or operates to their prejudice by giving undue preference to third parties. Baxendale *v.* Great Western Railway Co. 5 C. B. (N. S.), 336.

A railway company had charged a uniform rate of 3*s.* 6*d.* per ton on all goods in a particular class conveyed on their railway between R. and P., which were collected and delivered (principally), by the complainants at a charge of 4*s.* 10*d.* per ton; but had lately raised their charge for carrying goods under 500 lbs. weight to 8*s.* 4*d.* per ton, being the aggregate of the former charges for carrying, and collecting and delivery; and had intimated to the public that they would collect and deliver goods *free of all charges*. The real purpose of this arrangement was made apparent to the Court to be, to compel persons desiring to have their goods conveyed by the railway, to employ the company to collect and deliver such goods, and thus to secure this business *and the profit upon it*, to themselves, as well as to exclude the complainants from competing with them in this department of the business. Held, that the complainants were entitled to an injunction, — the above arrangement being objectionable, both as an undue preference given on the one hand, and as an unreasonable disadvantage imposed on the other; for it was an undue preference of the company in their separate capacity of carriers *other than on the line of railway*,

able facilities for receiving and forwarding all the traffic arriving by one of such railways or canals, by the other, without any

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inasmuch as they thereby secured to themselves the entire monopoly of the last-mentioned traffic, to the entire exclusion of the complainants and all others; and it was an undue prejudice and an unreasonable disadvantage imposed on the complainants, inasmuch as their goods, and those of all persons employing them to collect and deliver, must be subjected, as compared with the goods of the latter, twice over to the expense attendant on collection and delivery, if they were required to collect and deliver for them, or to an unnecessary charge if they required no such accommodation. Baxendale *v.* Great Western Railway Co. 5 C. B. (N. S.), 336. And the Court declined to review this decision upon a suggestion that it had been erroneously assumed on the argument that the collection and delivery of parcels was a source of profit, — the fact being otherwise. Baxendale *v.* Great Western Railway Co. 5 C. B. (N. S.), 356. And in Garton *v.* Great Western Railway Co. 5 C. B. (N. S.), 669, this decision was confirmed, although it appeared by affidavit that *no profit* was made either by the company or by the carrier upon the charges for collecting and delivering goods for their customers at the respective stations.

This section is not contravened by a railway company carrying at a lower rate, in consideration of a guarantee of large quantities and full train loads at regular periods, provided the real object of the company be to obtain thereby a greater remunerative profit, by the cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guaranty. Nicholson *v.* Great Western Railway Co. 5 C. B. (N. S.), 366.

The general rate of charge for the carriage of goods between Bristol and Bridgewater, was, 6*s.* 8*d.*, 8*s.* 4*d.*, 12*s.* 6*d.*, and 16*s.* 8*d.* per ton, for first, second, third, and fourth class goods respectively. The company had special contracts with certain grocers and ironmongers at Bridgewater, under which they agreed to carry all their grocery and ironmongery goods at a uniform rate of 6*s.* per ton, including delivery. Held an undue preference, — it not appearing that this diminished charge was justified by any special circumstances of advantage to the company, or to meet competition from another railway, or any other mode of carriage. Garton *v.* Bristol & Exeter Railway Co. 6 C. B. (N. S.), 639.

By their scale or tariff, a railway company divided the places through which their lines passed into districts, and charged at a reduced rate per ton for coals carried a given distance from P. or I. respectively, when consigned in full train loads of 200 tons, or 35 trucks. The advantage of this reduced rate was given to persons consigning coals from P. to one of these districts in full train loads, though on their arrival at C. the company, for their own convenience, saw fit to break up the train, and carry about one third of it forward by the ordinary goods trains, the whole consignment, however, ultimately finding its way into the district to which it was addressed by the consignor. Held, that this was not giving any undue preference to the P. coal-dealers, or imposing

unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals, or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf.

Section third enacts, that it shall be lawful for any company or person, complaining against any such companies or company of any thing done, or of any omission made in violation or contravention of this act, to apply in a summary way, by motion or summons, in England, to her Majesty's court of common pleas at Westminster, or in Ireland, to any of her Majesty's superior courts in Dublin, or in Scotland, to the court of session in Scotland, as the case may be, or to any judge of any such court; and upon the certificate to Her Majesty's Attorney-General in England or Ireland, or Her Majesty's Lord Advocate in Scotland, of the board of trade, alleging any such violation or contravention of this act, by any such companies or company, it shall also be lawful for the said Attorney-General or Lord Advocate, to apply in like manner to any such court or judge, and in either of such cases it shall be lawful for such court or judge to hear and determine the matter of such complaint;[1] and for that purpose, if such

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any undue prejudice on the dealers at I., although the latter were unable to avail themselves of the lower rate of charge for coals consigned by them to the same district, by reason of the insufficiency of the demand for sea-borne coals at the places comprised therein. Ransome *v.* Eastern Counties Railway Co. 8 C. B. (N. S.), 709.]

[1] [It is no ground of complaint, that the company working the main line refuse to grant third class return tickets to the branch line, if it appears that no such tickets are issued to other branches similarly situated. *In re*, Caterham Railway Co. 1 C. B. (N. S.), 410. But it seems that it is a good ground of complaint, that there is no shelter provided at the junction for passengers on the branch line waiting the arrival of trains; the public being entitled in this respect to reasonable accommodation. *In re*, Caterham Railway Co. 1 C. B. (N. S.), 410. To justify the interference of the Court to enforce the running of through trains on a continuous line of railways, under this section, it must be shown that *public* convenience requires it, and that it can be reasonably done. Barrett *v.* Great Northern Railway Co. 1 C. B. (N. S.), 423. They

court or judge shall think fit, to direct and prosecute, in such mode, and by such engineers, barristers, or other persons, as they shall think proper, all such inquiries as may be deemed necessary to enable such court or judge to form a just judgment on the matter of such complaint; and if it be made to appear to such court or judges on such hearing, or on the report of any such person, that any thing has been done, or omission made, in violation or contravention of this act, by such company or companies, it shall be lawful for such court or judge to issue a writ of injunction[1] or interdict, restraining

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will not interfere at the instance of an individual, where there is a continuous line by which through tickets may be obtained, though by a somewhat longer route, no additional cost or serious loss of time being thereby incurred, and no substantial inconvenience being thereby occasioned to the public, and it appearing that no complaints had been made of the inadequacy of the existing accommodation. Barrett *v.* Great Northern Railway Co. 1 C. B. (N. S.), 423. This act was designed to afford a remedy against an undue preference or undue prejudice to a particular individual or class, in respect of traffic on the railway and canal; and was not intended to apply to the case of a breach or neglect by the company, of a public duty which was already susceptible of redress by mandamus or by indictment. Bennett *v.* Manchester, Sheffield, and Lincolnshire Railway Co. 6 C. B. (N. S.), 707. The M., S., and L. Railway Co. were the proprietors of the Grimsby Old Dock, and also of another dock called the Grimsby New Dock, communicating with their railway. By Act of Parliament, the company was authorized and required to maintain the Old Dock and the approach thereto, of a given depth: — Held, that the failure to perform this duty, so that the dock and its approach became filled up, and the depth of water therein insufficient for vessels to get to the wharves adjoining, was not subject of redress under this act, — although it was suggested that the object of the company was to discourage the traffic to the Old Dock, and to divert it to the new one. Bennett *v.* Manchester, Sheffield, and Lincolnshire Railway Co. 6 C. B. (N. S.), 707. And it seems that the dock or haven was not a canal, or navigation within this statute. Bennett *v.* Manchester, Sheffield, and Lincolnshire Railway Co. 6 C. B. (N. S.), 707.]

[1] [The Court refused to grant a writ of injunction under this act, on the complaint of a company having a branch on a trunk line, to restrain the parent company from charging higher rates for the conveyance of passengers to the complainants' terminus, than they charged to the terminus of *another* branch line (in which they themselves were interested), extending over the same number of miles. *In re*, Caterham Railway Company, 1 C. B. (N. S.), 410. To induce the Court to interfere on a complaint by the proprietors of a branch line, that a sufficient number of trains of the main line do not stop at the junc-

such company or companies from further continuing such violation or contravention of the act, and enjoining obedience to the same; and in case of disobedience of any such writ of injunction or interdict, it is made lawful for such court or judge to order that a writ or writs of attachment[1] or any other process of such court incident or applicable to writs of injunction or interdict, to issue against any one or more of the directors of any company, or against any owner, lessee, contractor, or other person failing to obey such writ of injunction or interdict; and such court or judge is empowered, if they or he shall think fit, to make an order directing the payment by any one or more of such companies of such sum of money as such court or judge shall determine, not exceeding for each company the sum of two hundred pounds for every day, after a day to be named in the order, that such company or companies shall fail to obey such injunction or interdict; and such monies shall be payable as the court or judge may direct, either to the party complaining, or into court to abide the ultimate decision of the court, or to Her Majesty, and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by decree or judgment in any superior court at Westminster or Dublin, in England or Ireland, and in Scotland, by such diligence as is competent on an extracted decree of the court of session; and in any such proceeding as aforesaid, such court or judge may order and determine, that all or any costs thereof,

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tion, or stop at inconvenient times, it must be distinctly shown that sufficient accommodation is not afforded to meet the fair requirements of the public. *In re*, Caterham Railway Co. 1 C. B. (N. S.), 410.]

[1] [The Court refused to grant an attachment against a railway company for disobedience to a writ of injunction under this act, enjoining them to desist from giving an undue preference, in respect of the carriage of coals, to persons carrying coals to P. or other places, to or toward certain places mentioned in the rule, the affidavits on the part of the company showing a *bonâ fide* endeavor on their part to conform to the order of the Court, although it appeared that the reformed scale of charges still operated in some respects injuriously to the interests of the complainants, and advantageously to the other parties. Ransome *v.* Eastern Counties Railway Co. 4 C. B. (N. S.), 159.]

or thereon incurred, shall and may be paid by or to the one party or the other, as such court or judge shall think fit;[1] and it shall be lawful for any such engineer, barrister, or other person, if directed so to do by such court or judge, to receive evidence on oath relating to the matter of any such inquiry, and to administer such oath.

Section fourth declares it shall be lawful for the said Court of Common Pleas at Westminster, or any three of the judges thereof, of whom the Chief Justice shall be one, and it shall be lawful for the said courts in Dublin, or any nine of the judges thereof, of whom the Lord Chancellor, the Master of the Rolls, the Lords Chief Justice of the Queen's Bench and Common Pleas, and the Lord Chief Baron of the Exchequer, shall be five, from time to time to make all such general rules and orders as to the forms of proceedings and process, and all other matters and things touching the practice and otherwise in carrying this act into execution before such courts and judges, as they may think fit, in England or Ireland, and in Scotland, it shall be lawful for the Court of Session to make such acts of sederunt for the like purpose as they shall think fit.

Section fifth. Upon such application of any party aggrieved by the order made upon any such motion or summons as aforesaid, it shall be lawful for the Court or Judge by whom such order was made, to direct, if they think fit so to do, such motion or application on summons to be reheard before such court or judge, and upon such rehearing to rescind or vary such order.

Section sixth provides that no proceeding shall be taken for any violation or contravention of the above enactments, except in the manner herein provided; but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or company against any railway or canal, or railway and canal company, under the existing law.[2]

Section seventh. Every such company as aforesaid shall be

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[1] [Where the complainant asked by the rule more than he was entitled to, and the company were partially in the wrong, the court refused to allow costs to either. Oxlade *v.* North-eastern Railway Co. 1 C. B. (N. S.), 454.]

[2] [This act does not interfere with the right of a party aggrieved by overcharges, to maintain an action to recover back the sums paid in excess. Baxendale *v.* Eastern Counties Railway Co. 4 C. B. (N. S.), 63.]

liable for the loss of, or for any injury done to, any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void: Provided always, that nothing herein contained, shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the Court or Judge before whom any question relating thereto shall be tried, to be just and reasonable:[1] Provided always, that no

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[1] [This section does not prevent a railway company from making a special contract as to the terms upon which they will carry goods, provided such contract be "just and reasonable," and signed by the party sending the goods. And it is for the Court to say, upon the whole matters brought before them, whether or not the "condition" or "special contract" is just and reasonable. Simons *v.* Great Western Railway Co. 18 C. B. 804.

A condition that the company will not be accountable for the *loss*, detention, or damage of any package insufficiently or improperly packed, is unjust and unreasonable. Simons *v.* Great Western Railway Co. 18 C. B. 804. It seems that a condition "that no claims for damages will be allowed, unless made within three days after the delivery of the goods, nor for loss, unless made within three days of the time that they should be delivered," is just and reasonable. Simons *v.* Great Western Railway Co. 18 C. B. 804. A condition that, in the case of goods conveyed at special or mileage rate, the company will not be responsible for any loss or damage, *however caused*, is just and reasonable. Simons *v.* Great Western Railway Co. 18 C. B. 804.

A case sent by a country judge for the opinion of the Court, stated that goods were received by the defendants, a railway company, under the following note, signed by the plaintiff, — "Risk note, London & North-western Railway Company, Park Lane Station, Dec. 19, 1855. Hay, straw, furniture, glass, marble, china, castings, and other brittle and hazardous articles, &c., conveyed at the risk of the owners. Delivered to London and North-western Railway Company, from R. C. Dunham (the plaintiff), three crates beef, for F. C. Duckworth, Newgate Market, to be forwarded from Liverpool to London at owner's risk. Held, that the Court could not, from this statement, judge whether or not the condition was "just and reasonable," within this section. London and North-western Railway Co. 18 C. B. 826.

Where a railway company did not receive any goods to be carried by them,

greater damages shall be recovered for the loss of, or for any injury done to any of such animals, beyond the sums herein-

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unless the consignor signed a paper containing various conditions subject to which they were to be carried, and which were held to be reasonable; held, that the contract was a special contract within this section, and that the defendants did not receive the goods to be carried by them *as common carriers*. White *v.* Great Western Railway Co. 2 C. B. (N. S.), 7. A railway company framed a scale of charges for the carriage of parcels not exceeding 1 cwt. each, which charges were higher than the tonnage rates warranted by § 175 of their act of incorporation, but which included a reasonable charge for the use of their carriages and locomotive power under §§ 177 and 179 of said act. Under this scale, where a number of *separate parcels* (each weighing less than 1 cwt., but exceeding 1 cwt. if taken in the aggregate), were brought to the railway by the same person, and containing the same articles, and *all directed to the same person* at their place of destination, the company charged the tonnage or lower rate allowed by § 175; but, if similar parcels were brought *addressed to several different persons*, they were charged the parcels or higher rate. Held, that there was nothing to induce the Court (or which ought to induce a Jury), to infer that the charges so made were unreasonable, regard being had to the additional trouble incurred by the company. Baxendale *v.* Eastern Counties Railway Co. 4 C. B. (N. S.), 63.

A section in the act incorporating a railway company provided that "the aforesaid rates and tolls, to be taken by virtue of the act, should at all times be charged *equally*, and *after the same rate per ton* throughout the whole of said railway, in respect of the same description of articles, matters, or things," and that "no reduction or advance in the said rates or tolls should, either directly or indirectly, be made partially, or in favor of or against, any particular person or company." *Quære*, whether this applies to "small parcels?" It seems, by Byles, J., that it does. Baxendale *v.* Eastern Counties Railway Co. 4 C. B. (N. S.), 63. It is competent for a railway company to enter into special agreements, whereby advantages may be secured to individuals in the carriage of goods upon the railway, where it is made clearly to appear, that, in entering into such agreements, the company have the interests of the proprietors and the legitimate increase of the profits of the railway in view, and the consideration given to the company in return for the advantages afforded by them is adequate, and the company are willing to afford the same facilities to all others upon the same terms. Nicholson *v.* Great Western Railway Co. 5 C. B. (N. S.), 366. The preceding decision was reviewed and sustained in 7 C. B. (N. S.), 755.

The agent of the plaintiff, by his orders, delivered to defendants, a railway company, some marbles for carriage; and, in answer to inquiries by defendants as to the terms upon which the marbles were to be carried, wrote to defendants, inquiring the "rate of insurance on marble." Afterwards, one W., on behalf of the agent, had an interview with defendants, who informed

after mentioned; (that is to say) for any horse, fifty pounds; for any neat-cattle, per head, fifteen pounds; for any sheep or

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him of their charges for carrying marbles uninsured and insured, respectively. A printed notice of conditions had been sent to the agent by the defendants. One of the conditions was, "that the company shall not be responsible for the loss of or injury to any marbles" "unless declared and insured according to their value." W., after the interview, and after the conditions had been sent to the plaintiff's agents, wrote to defendants, signing on behalf of the agents, "Please to forward the three cases of marble, not insured, as directed, to, &c." The marbles were forwarded by defendants, and while on their premises, were damaged, without wilful negligence of defendants. Plaintiff sued defendants, as common carriers, for the damage. Defendants pleaded, among other things, 4. That the marbles were delivered under a special contract, signed by the person delivering them (setting out the contract in the terms of the printed condition), and that they were not declared or insured. Held, by the Court of Exchequer Chamber (Williams, J., dissenting), reversing the judgment of the Court of Queen's Bench, that the fourth proviso, as to signed contracts in this section, referred to contracts of the same kind as those mentioned in sect. 6, of the Carrier's Act, 11 Geo. 4, and 1 Will. 4, c. 68; that the letter of W., signed on behalf of the persons delivering the goods, coupled with the forwarding of the marbles in pursuance of that letter, constituted a sufficient special contract within the fourth proviso of this section: That the letter might be read with reference to the other correspondence, and evidence given at the trial; and that, so read, or read either by itself, or according to the ordinary understanding of language used between carriers and their customers, or with reference to the general provisions of the Carrier's Act, the terms of the contract were those alleged in the plea, and that the fourth plea was therefore proved. Peck *v.* North Staffordshire Railway Co. 1 El. Bl. & El. 958.

This section extends to cases where a special contract has been signed in conformity with the subsequent provision of this statute. So held in the Court of Exchequer Chamber, reversing the Court of Exchequer (reported in 2 Hurl. & Norm. 593). *Dissentiente*, Erle, J., M'Manus *v.* Lancashire & Yorkshire Railway Co. 4 Hurl. & Norm. 327.

The plaintiff brought three horses to the cattle station of the defendant's railway at L., to be forwarded by a cattle truck to Y. The defendant's servant provided a truck for the purpose, which to all external appearance, and so far as the servant knew, was sufficient for the purpose. The plaintiff signed a ticket which contained the following memorandum: "This ticket is issued, subject to the owner's undertaking all risks of conveyance, loading and unloading whatsoever; as the company will not be responsible for any injury or damage (howsoever caused), occurring to live-stock of any description, travelling upon the railway or in their vehicles." The truck proved to be insufficient for the carriage of the horses, and a hole was made in it on the journey, by which the horses were injured. Held, by the Court of Exchequer Chamber, re-

pigs, per head, two pounds; unless the person sending or delivering the same to such company shall, at the time of such

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versing the judgment of the Court of Exchequer (2 Hurl. & Norm. 693); first, that the condition that the company "would not be responsible for any injury or damage howsoever caused," was not just and reasonable, and therefore void. Secondly, that it did not protect the defendants from liability in respect of the defect in the truck. *Dissentiente*, Erle, J. Per Erle, J., that the condition did not extend to wilful neglect or other misfeasance, M'Manus *v.* Lancashire & Yorkshire Railway Co. 4 Hurl. and Norm. 327.

A person sending cattle by railway signed a contract containing the following amongst other conditions: "A pass for a drover to ride with his stock will be given. The company is to be held free from all risk in respect of any damage arising in the loading or unloading, from suffocation, or from being trampled upon, bruised, or otherwise injured in the transit, from fire, or from any other cause whatsoever." A drover received a pass to go with the cattle. The cattle were not put into proper cattle trucks, but into vans closing with lids, ordinarily used for the conveyance of salt, the drover not objecting. The lid of one of the vans having become closed in the course of the journey, several of the cattle were suffocated, the drover being at the time in another carriage. Held, that the conditions were reasonable, and that the company were not responsible. Pardington *v.* South Wales Railroad Co. 1 Hurl. & Norm. 392.

A railway company gave public notice that fish would only be conveyed on their line by special agreement and by particular trains; and that the sender should sign certain conditions, as follows: "That the company should not be responsible, under any circumstances, for loss of market, or for other loss or injury arising from delay or detention of trains, exposure to weather, stowage, or from any cause whatever, other than gross neglect or fraud;" and they notified "that fish under special conditions, would be conveyed by the 6.50, A.M., the 8.55, A.M. (and other named) trains, subject in all cases to the immediate convenience and arrangements of the company." These conditions having been signed by a person sending first by the railway; Held, that they were just and reasonable conditions within the meaning of this section, and that they constituted a valid contract binding upon the party who had signed them. Beal *v.* South Devon Railway Co. 5 Hurl. & Norm. 875.

The plaintiff delivered to a railway company, eighteen packages to be carried on their line. He filled up and signed a receiving note, describing the goods as "furniture." On the paper, under the head "conditions," were these words: "*No claim for deficiency, damage, or detention will be allowed, unless made within three days after the delivery of the goods; nor for loss, unless made within seven days of the time they should have been delivered; and that the company will not be answerable for the loss or detention of any goods which may be untruly or incorrectly described in the receiving note.*" The plaintiff said, "he was told to sign the paper, and did so. He might have seen the word 'conditions,' but did not read them, and did not know, and was not told what they were." One of

delivery, have declared them to be respectively of higher value than as above mentioned; in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned, a reasonable percentage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the the ordinary rate of charge; and such percentage or increased rate of charge shall be notified in the manner prescribed in the statute 11 Geo. 4, and 1 Will. 4, c. 68, and shall be binding upon such company in the manner therein mentioned: Provided also, that the proof of the value of such animals, articles, goods, and things, and the amount of injury done thereto, shall in all cases lie upon the person claim-

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the packages consisted of a sack of clothes, which was not delivered, but no claim was made, until more than seven days from the time when the same should have been delivered. Held: First, that there was nothing to rebut the presumption arising from the signature of the paper by the defendant that he understood that the contract was subject to the conditions. Secondly, that the conditions were just and reasonable within the meaning of this section; and therefore the company had a defence to an action on the ground that the claim was not made within seven days, and that the bag of clothes was misdescribed. *Quære*, whether, under this section, the decision of a judge at Nisi Prius, as to the reasonableness of the conditions, can be reviewed by the court above, where leave for that purpose is not reserved. Per Pollock, C. B., that it can be so reviewed. Lewis *v.* Great Western Railway Co. 5 Hurl. & Norm. 867; *Semble*, per Martin, B., and Bramwell, B., that notwithstanding this section, special contracts are binding, whether the conditions contained in them are reasonable or not. Pardington *v.* South Wales Railroad Co. 1 Hurl. & Norm. 392.

A horse was delivered to the G. W. Railway Co. at N. to be conveyed to W. for the plaintiff. The person who delivered the horse, signed a contract agreeing to abide by a notice contained in it, that the directors would not be answerable for damage done to any horses conveyed by the railway. The horse reached the station at W. safely, but the company's servants then either forgot or did not notice that the horse had arrived, and on the plaintiff calling for it the next day, it was discovered in a horse box on a siding, and found to have sustained serious injuries from cold, and from remaining in a confined position all night: Held, that the railway company was protected from liability under this section, by the signed contract. It seems, independently of such contract, the company would not have been responsible, the injury having been the result of the plaintiff not being ready to receive the horse on its arrival at W. Wise *v.* Great Western Railway Co. 36 Eng. Law & Eq. 574.]

ing compensation for such loss or injury: Provided also, that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid, shall be binding upon or affect any such party, unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage: Provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the said act of 11 Geo. 4, and 1 Will. 4, c. 68, with respect to articles of the descriptions mentioned in the said act.]

§ 574. Seventhly. The next inquiry is, what will excuse or justify a non-delivery of the goods by a common carrier. From what has been said, it is a sufficient excuse or justification for him to show, that, without any negligence on his part, the goods have been lost by the act of God, or of the public enemy; and in cases of special limitations of responsibility by notices or otherwise, that the loss has been by other perils, against which he did not insure, or under circumstances which do not affect him with the imputation of undue negligence.[1] But it constitutes no excuse for him, that he has made a delivery to the wrong person in consequence of a forged order;[2] [nor that he went to the house of the cashier of a bank twice to deliver money, and at each time found the cashier absent.[3]] Under the ordinary contract of common carriers, the burden of proof of the excuse or justification lies on him;[4] but in cases of notices (as has been already seen),[5] the burden of proof of negligence rests on the party who delivers the goods.

§ 575. But there are also cases, where the carrier's own agency is concerned in the loss, which, however, is by law deemed excusable. Thus, in cases of throwing goods overboard to lighten a ship or boat, and preserve life, the carrier will be

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[1] See Ante, § 573; Id. § 570, 571.

[2] Powell *v.* Myers, 26 Wend. R. 591. See Devereux *v.* Barclay, 2 Barn. & Ald. R. 702; Ante, § 545 *b*, § 570.

[3] Merwin *v.* Butler, 17 Conn. R. 138. See Ante, § 549 *a*.

[4] Ante, § 529. But see Muddle *v.* Stride, 9 Carr. & Payne, R. 380.

[5] Ante, § 573.

excused, if it has arisen from necessity.[1] Thus, if a ferryman should, in a storm, throw overboard even a box of jewels, if it was done from absolute necessity to save life, he would stand excused.[2] But if it was done without necessity, or rashly and imprudently, it would be otherwise.[3]

§ 576. A carrier may also show in his defence, that the goods have perished by some internal defect, without any fault on his side; for his warranty does not extend to such cases.[4] And if, from the nature of the goods carried, they are liable to peculiar risks, and the carrier takes all reasonable care, and uses all proper precautions to prevent injuries, and if, notwithstanding, they are destroyed by such risks, he is excusable, Thus, if horses or other animals are transported by water, and in consequence of a storm they break down the partitions between them, and by kicking each other some of them are killed, the carrier will be excused; and it will be deemed a loss by perils of the sea.[5] [But where a horse on board a boat upon the Mississippi escaped from his fastenings, in the night, and was lost in the river, in fair weather, the carrier was held responsible;[6] and it has been declared generally, that those who undertake the transportation of live animals, take upon themselves the same obligations to deliver them safely, against all contingencies, except such as would excuse for the non-delivery of other property,[7] or, as elsewhere stated, the carrier is liable for any injury which he could by care and diligence prevent,[8] although it arise from the conduct of the animals themselves.]

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[1] Abbott on Shipp. P. 3, ch. 8, § 2, 3, 4, 5th edit.; Ante, § 525, 530 *a*, 531; 2 Kent, Comm. Lect. 40, p. 604, 4th edit.

[2] Mouse's case, 12 Co. R. 63; Barcroft's case, cited in Kenrig *v.* Eggleston, Aleyn, R. 93; Smith *v.* Wright, 1 Cain. R. 43; 2 Kent, Comm. Lect. 40, p. 604; 4th edit.; Ante, § 525, 531; Jones on Bailm. 107, 108.

[3] Barcroft's case, cited in Kenrig *v.* Eggleston, Aleyn, R. 93; Jones on Bailm. 107, 108; Bird *v.* Astcock, 2 Bulst. R. 280; 2 Roll. Abridg. 567; Ante, § 525, 531.

[4] Ante, § 492 *a*.

[5] Gabay *v.* Lloyd, 3 Barn. & Cress. R. 793; Lawrence *v.* Aberdein, 5 Barn. & Ald. R. 107.

[6] Porterfield *v.* Humphreys, 8 Humphreys, R. 497.

[7] Wilsons *v.* Hamilton, 4 Ohio St. R. 739.

[8] Clarke *v.* Rochester & Syracuse Railroad Co. 4 Kernan (N. Y.), R. 570.

§ 577. In respect to the carriage of slaves, a question has been made, how far the carrier incurs the common-law responsibility. A slave has volition and feelings, which cannot be entirely disregarded. These properties cannot be overlooked in conveying him from place to place. He cannot be stowed away like a common package. Not only does humanity forbid this proceeding, but it might endanger his life and health. Consequently, this rigorous mode of proceeding cannot be safely adopted, unless stipulated for by express contract. The slave, being at liberty to escape, may escape. The carrier has not, and cannot have, the same absolute control over him that he has over inanimate matter. In the nature of things, and in his character, he resembles a passenger, and not a package of goods. It would seem reasonable, therefore, that the resonsibility of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods. For these reasons, it has been held, that the doctrine of common carriers, as to goods, does not apply to the carriage of slaves, and that the carrier is not liable for the loss of slaves, unless it has been caused by the negligence or unskilfulness of himself, or of his agents.[1] Therefore, where certain slaves in the yawl of a steamboat carrier were upset and drowned, it was decided that the carrier was not responsible for the loss, unless it was caused by the negligence or unskilfulness of himself or his agents.[2]

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[1] Boyce *v.* Anderson, 2 Peters, R. 150; Stokes *v.* Saltonstall, 13 Petees, R. 181. See also, Swigert *v.* Graham, 7 B. Monroe (Kentucky), R. 661; Ante, § 216, 217; McClenaghan *v.* Brock, 5 Rich. R. 17.

[2] Boyce *v.* Anderson, 2 Peters, R. 150. It has been sometimes supposed (and so it was stated in the first edition of the present work), that the Court in this case laid down the rule, that the carrier of slaves was not responsible for any loss of the slaves in the course of the voyage or journey, unless the carrier was guilty of ordinary negligence. But, although there is some suggestion to this effect made, *arguendo*, in the reasoning of Mr. Chief Justice Marshall, in delivering the opinion of the Court, yet it will be found, upon a careful examination of the result, as stated in the close of the opinion, that the Court did not intend so to state the doctrine. "We think," is the language, "that, in the case stated for the instruction of the Circuit Court, the defendants were respon-

§ 577 *a*. In the Roman law, the case of the wounding or killing of a slave by the overturning of a passenger-coach, through the carelessness or misconduct of the coachman, is treated as a clear case of liability on the part of the owner of the coach, as imputable to negligence. *Quæritur, si cisiarius, id est carucarius, dum cæteros transire contendit, cisium evertit, et servum quassavit, vel occidit. Puto* (says Ulpian) *ex locato esse in eum actionem; temperare enim debuit. Sed et utilis Aquilia ei dabitur.*[1]

§ 578. A non-delivery will also be excused by any act of the shipper which discharges the carrier from any further responsibility.[2] As if, with the consent of the shipper, he delivers them over to another carrier; or he deposits them at an intermediate place, to await the future orders of the shipper; or if the shipper takes them into the exclusive custody of himself or his own servants.[3] But it will be otherwise, if he merely accompanies them in their transit, not exercising any exclusive custody over them.[4]

§ 579. In like manner, the carrier will be excused for a non-delivery, if it has been occasioned by the illegal act of the shipper.[5] Thus, if the goods have been forfeited by the illegal

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sible only in the event of its (the loss of the slaves) being caused by the negligence or the unskilfulness of the defendants or their agents." Id. p. 156. See also, Stokes *v.* Salstonstall, 13 Peters, R. 181, 192. Perhaps the rule as thus laid down does not essentially differ from what is applicable to other passengers. Williams *v.* Taylor, 4 Porter (Ala.), R. 234, 238; Clark *v.* McDonald, 4 McCord, R. 223. See Post, § 601, 602.

[1] Dig. Lib. 19, tit. 2, l. 13 (*præm.*); Pothier, Pand. Lib. 19, tit. 2, n. 29; Ante, § 400, 401.

[2] Boyce *v.* Anderson, 2 Peters, R. 150; Gregson *v.* Gilbert, Park, Insur. ch. 3, § 4, note.

[3] Ante, 269, 541, 542; Sparrow *v.* Caruthers, 2 Str. R. 1236; Hurry *v.* Royal Exch. Assur. Co. 2 Bos. & Pull. R. 430; Rucker *v.* Lond. Assur. Co. Marsh. Insur. B. 1, ch. 7, § 5, p. 252, &c. 2d edit.; Barnwell *v.* Hussy, 1 Const. Rep. (S. Car.), 114; East India Co. *v.* Pullen, 1 Str. R. 690; Sanderson *v.* Lamberton, 6 Binn. R. 129; Strong *v.* Natally, 1 Bos. & Pull. New R. 16; Parsons *v.* Hardy, 14 Wend. R. 215; Bowman *v.* Teall, 23 Wend. R. 306; Todd *v.* Figley, 7 Watts, R. 542.

[4] Robinson *v.* Dunmore, 2 Bos. & Pull. R. 419; 1 Roll. Abridg. 2, C. Pl. 3; Marsh. Insur. B. 1, ch. 7, § 5, p. 252, &c. 2d edit.; Ante, § 533, 534.

[5] Ante, § 492 *a*.

act of the shipper, and are seized for the forfeiture, the carrier is discharged.[1] But a mere seizure for a supposed forfeiture if it is in fact without any justifiable cause, leaves the carrier still bound by his contract.[2]

§ 580. But an excuse, which in a practical sense is much more important and extensive, is that resulting from the right of the shipper to stop the goods in the possession of the carrier, while they are still in transit. This right is commonly called in the common law the right of stoppage *in transitu.* Whenever it arises, and is properly exercised, the carrier is completely discharged from all further responsibility.

§ 581. This is not the place for a full discussion of this subject, as it belongs more appropriately to another branch of commercial and maritime jurisprudence.[3] It may, however, be useful to state some few particulars with respect to it. When goods are shipped on a credit by a seller or consignor, and the consignee or buyer becomes insolvent, or has failed before their arrival, the law, in order to prevent the loss which would otherwise happen to the seller or consignor, allows him, in many cases, to countermand the delivery, and, at or before the arrival of the goods at the place of destination, to cause them to be redelivered to himself, or to some other person, appointed to act for him.[4] This is usually called a stoppage *in transitu.*[5] In such a case, the delivery to the carrier is supposed to vest the title to the property in the buyer, subject only to this right of devestment or stoppage *in transitu.* This right, however (as will be at once perceived), is not an unlimited right. It exists only in cases where all the following circumstances concur: where the goods are sold on a credit; where the consignee is insolvent; where the goods are still in transit, and have not been delivered to the consignee; and where the buyer has not yet parted with his ownership to any *bonâ fide* purchaser without notice under him. Each of these

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[1] Gosling *v.* Higgins, 1 Camp. R. 451.

[2] Ibid.

[3] See Abbott on Shipp. P. 3, ch. 9, *per tot.*, p. 364, to 396, 5th edit.

[4] Abbott on Shipp. P. 3, ch. 9, § 1, p. 364, 5th edit.

[5] Ibid.

requisites is important enough to deserve a separate discussion in its proper place; and especially the question, under what circumstances the transit is or is not at an end, which is full of nice distinctions and curious learning. At present, no more is necessary in this place than to bestow this hasty glance upon them.[1]

§ 582. Another excuse which may be asserted, under certain circumstances, is, when the goods are demanded or taken from the possession of the carrier by some person having a superior title to the property.[2] In general, the carrier is not permitted to dispute the title of the person who delivers the goods to him, or to set up an adverse title to defeat his right of action growing out of his contract.[3] And this is emphatically the rule, when that adverse claim is not asserted by the superior claimant himself, but is merely asserted by the carrier of his own mere motion.[4] Formerly, it seems to have been thought, that if the adverse title was asserted by the superior claimant, and the carrier had due notice of it, and was forbidden to deliver it to the bailor, he might protect himself from responsibility, and set up such title against the bailor.[5] But this doctrine, although perhaps maintainable in some cases under special circumstances, is now deemed to be generally untenable;[6] and therefore the carrier may be placed in a posi-

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[1] The subject is considered at large in Lord Tenterden's Treatise on Shipping. See Abbott on Shipp. P. 3, ch. 9, *per tot.*, p. 354 to 396, 5th edit.

[2] Ante, § 266; Coombs *v.* Bristol and Exeter Railway, 3 Hurl. & Norm. R. 1; Bliven *v.* Hudson River Railroad, 35 Barbour, R. 191; Bates *v.* Stanton, 1 Duer, R. 85.

[3] Laclouch *v.* Towle, 3 Esp. R. 115. See also, Kieran *v.* Sandars, 6 Ad. & Ell. R. 515; Nickolson *v.* Knowles, 5 Madd. R. 47; Story on Agency, § 217; 2 Story on Eq. Jurisp. § 814 to 817; Ante, § 264, 450.

[4] See Story on Agency, § 217; 2 Story on Eq. Jurisp. § 816, 817; Ante, § 450.

[5] Ogle *v.* Atkinson, 5 Taunt. R. 759; Bates *v.* Stanton, 1 Duer (N. Y.), R. 79; Pitt *v.* Albritton, 12 Ired. R. 77; Ante, § 450.

[6] Ante, § 266. [In Sheridan *v.* The New Quay Co. 4 J. Scott (N. S.), 649, Willes, J., says: "The defendants were common carriers. The law would have protected them against the real owner, if they had delivered the goods in pursuance of their employment, without notice of his claim. It ought equally to protect them against the pseudo owner, from whom they could not refuse

tion in which he cannot safely deliver the goods to either party. For where the adverse title is made known to the carrier, if he is forbidden to deliver the goods to any other person, he acts at his peril; and if the adverse title is well founded, and he resists it, he is liable to an action for the recovery of the goods by the person setting up such adverse title.[1]

§ 582 *a*. Where a common carrier has been guilty of negligence, whereby the owner of the goods has sustained an injury, the subsequent acceptance of the goods by the owner is no bar to an action for such injury; for nothing short of a release or satisfaction constitutes such a bar. But it may be given in evidence in mitigation of damages, so as to limit the amount to the actual loss sustained by the owner.[2]

§ 583. Eighthly. The doctrine of average and contribution. This principally arises in cases of jettison, and other accidents in the transportation of goods by sea.[3] In such cases, where goods are thrown overboard for the common benefit, or other positive sacrifices are made, or expenses incurred for the same purpose, the law allows a compensation to those who have made the sacrifice, and have incurred the loss

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to receive the goods, in the present event of the real owner claiming the goods, and their being given up to him. The compulsory character of the employment of a carrier furnishes ample ground for so holding; and we do not assent to the altered statement of the law in the later editions of Story on Bailments, § 266 and 582, the earlier editions of that valuable work having laid it down in accordance with our view." See the 2d ed. of Story on Bailments, § 582, published in 1839. The changes above referred to, were made by the learned author of this work in his lifetime.] See also, as to the right of a bailee to set up the *jus certii*. King *v.* Richards, 6 Wharton, R. 418; Floyd *v.* Bovard, 6 Watts. & Serg. R. 76; Bates *v.* Stanton, 1 Duer, R. 79; Beach *v.* Bardell, 2 Duer, R. 327; Starker *v.* Dement, 9 Gill, R. 7; Lawrence *v.* Berry, 19 Alabama, R. 130.

[1] Taylor *v.* Plumer, 3 M. & Selw. R. 562; Wilson *v.* Anderton, 1 Barn. & Ad. R. 450; 2 Story on Eq. Jurisp. § 816, 817; Ante, § 266, 450; Story on Agency, § 217.

[2] Bowman *v.* Teall, 23 Wend. R. 306; Baylis *v.* Usher, 4 Moore & Payne, R. 790; s. c. under the name of Bayliss *v.* Fisher, 7 Bing. R. 153; Willoughby *v.* Backhouse, 2 Barn. & Cress. R. 821. See Hand *v.* Baynes, 4 Whart. R. 204, that the value of the goods lost is the ordinary rule of damages.

[3] See Ante, § 525, 530, 575; Story on Agency, § 118.

or expense; and they may demand a *pro ratâ* contribution from all other persons deriving a benefit therefrom according to their interest, toward the loss or expense. This, in cases of accidents at sea, is called a general average, or general contribution, in which ship, cargo, and freight are compelled to contribute, according to their value, to repay the common loss. It seems that, in this contribution to general average, there is no difference whether the goods belong to the government or to private shippers.[1] But the full discussion of this subject properly belongs to a treatise on the law of shipping.[2]

§ 584. Carriers on land may also entitle themselves, if not to a common contribution in the nature of a general average, at least to a compensation for expenses necessarily incurred by them about the preservation of the goods from extraordinary perils, which do not properly belong to themselves as carriers.[3] Thus, if a sudden flood or storm should do injury to the goods, and require some immediate expense for their preservation, the carrier will be bound to incur it, and will be entitled to a reimbursement.[4]

§ 585. Ninthly. The general rights of carriers. In virtue of the delivery of the goods, they acquire a special property in them, and may maintain an action against any person who displaces that possession or does any injury to them.[5] This right arises from their general interest in conveying the goods, and their responsibility for any loss or injury to them during their transit.[6] And, having once acquired the lawful possession of the goods for the purpose of carriage, the carrier is not obliged to restore them to the owner again, even if the carriage

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[1] United States *v.* Wilder, 3 Sumn. R. 308.

[2] Abbott on Shipp. P. 3, ch. 8, 5th edit.; Stevens on Average, Benecke on Insurance, Park on Insurance, and Marshall on Insurance, in their respective chapters on General Average.

[3] Story on Agency, § 141; The Gratitudine, 3 Rob. Adm. R. 255 to 258; Ante, § 389.

[4] Ibid.

[5] Bac. Abridg. *Contract*, C.; Jones on Bailm. 80; Goodwin *v.* Richardson, 1 Roll. Abridg. 5; Arnold *v.* Jefferson, 1 Ld. Raym. 275; Wilbraham *v.* Snow, 1 Vent. R. 52; s. c. 2 Saund. R. 47 *b*, 47 *c*, and note.

[6] Ibid.

is dispensed with, unless upon being paid his due remuneration; for by the delivery he has already incurred certain risks.[1]

§ 586. A carrier is in all cases entitled to demand the price or hire of carriage, before he receives the goods; and if it is not paid, he may refuse to take charge of them. If, however, he takes charge of them without the hire being paid, he may afterwards recover it;[2] [subject, however, to any deduction for damages to the goods through his fault.[3]]

§ 587. The compensation, which becomes due for the carriage of goods by sea, is commonly called freight; and the circumstances, under which the whole or a part only of the freight is earned, form a head of great practical importance under the law of shipping. It will accordingly be found treated of at large in professed treatises on that subject.[4]

§ 588. The carrier is also entitled to a lien on the goods for his hire [and for his advances to others for freight and storage[5]], and is not compellable to deliver them until he receives it, unless he has entered into some special contract, by which it is waived.[6] [His lien, however, does not authorize him to sell the goods without any legal proceedings;[7] nor has he a lien thereon for former freight unpaid, nor for other indebtedness.[8]] His lien may also be defeated by giving up the possession of

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[1] Bradhurst *v.* Columbian Ins. Co. 9 Johns. R. 17; Herbert *v.* Hallett, 3 Johns. Cas. 93; Higgins *v.* Bretherton, 5 Carr. & Payne, R. 2.

[2] Wright *v.* Snell, 5 Barn. & Ald. R. 353; Jackson *v.* Rogers, 2 Show. R. 327; Morse *v.* Slue, 1 Vent. R. 238; Batson *v.* Donovan, 4 Barn. & Ald. R. 32; Rex *v.* Kilderby, 1 Saund. R. by Williams, 312 *a*.

[3] Fitchburg Railroad *v.* Hanna, 6 Gray, 539; Bancroft *v.* Peters, 4 Mich. 619.

[4] Abbott on Shipp. P. 3, ch. 7, 5th edit.

[5] White *v.* Vann, 6 Humph. R. 70.

[6] Skinner *v.* Upshaw, 2 Ld. Raym. 752; Sodergren *v.* Flight, 6 East, R. 622; s. c. Abb. Shipp. 268; Hutton *v.* Bragg, 2 Marsh. R. 345; Stevenson *v.* Blakelock, 1 Maule & Selw. R. 543; Chase *v.* Westmore, 5 Maule & Selw. R. 186; Crawshay *v.* Homfray, 4 Barn. & Ald. R. 50; Rushforth *v.* Hadfield, 6 East, R. 522; 2 Kent, Comm. Lect. 40, p. 611; Id. Lect. 41, p. 634 to 642, 4th edit.; Hunt *v.* Haskell, 24 Maine R. 329; Gledstanes *v.* Allen, 22 Eng. Law and Eq. R. 382; s. c. 12 Com. B. Rep. 202.

[7] Sullivan *v.* Park, 33 Maine R. 438.

[8] Adams *v.* Clark, 9 Cush. 215.

the goods; and if it is once waived, it cannot afterwards be resumed.[1] [But this lien does not attach to goods wrongfully delivered to a carrier by a person not the owner, although the carrier carry the goods innocently.[2] Nor has a carrier who re-

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[1] Kinloch *v.* Craig, 3 Term R. 119; Sweet *v.* Pym, 1 East, R. 4; Yates *v.* Railston, 8 Taunt. P. 293; 2 Kent, Comm. Lect. 40, p. 611; Id. Lect. 41, p. 634 to 642, 4th edit.; Bowman *v.* Hilton, 11 Ohio R. 303.

[2] [Fitch *v.* Newberry, 1 Douglass (Mich.), 1. In Robinson *v.* Baker, 5 Cush. R. 137, Fletcher J., said: "It is certainly remarkable, that there is so little to be found in the books of the law, upon a question which would seem likely to be constantly occurring in the ancient and extensive business of the carrier. In the case of Yorke *v.* Grenaugh, 2 Ld. Raym. 866, the decision was, that if a horse is put at the stable of an inn by a guest, the innkeeper has a lien on the animal for his keep, whether the animal is the property of the guest or of some third party from whom it has been fraudulently taken or stolen. In that case, Lord Chief Justice Holt cited the case of an Exeter common carrier, where one stole goods and delivered them to the Exeter carrier, to be carried to Exeter; the right owner finding the goods in possession of the carrier, demanded them of him; upon which the carrier refused to deliver them unless he was first paid for the carriage. The owner brought trover, and it was held, that the carrier might justify detaining the goods against the right owner for the carriage; for when they were brought to him, he was obliged to receive them, and carry them, and therefore since the law compelled him to carry them, it will give him a remedy for the premium due for the carriage. Powell, J., denied the authority of the case of the Exeter carrier, but concurred in the decision as to the innkeeper. There is no other report of the case of the Exeter carrier to be found. Upon the authority of this statement of the case of the Exeter carrier, the law is laid down in some of the elementary treatises to be, that a carrier, who receives goods from a wrongdoer or thief, may detain them against the true owner until the carriage is paid.

"In the case of King *v.* Richards, 6 Whart. 418, the Court, in giving an opinion upon another and entirely different and distinct point, incidentally recognized the doctrine of the case of the Exeter carrier. But until within six or seven years there was no direct adjudication upon this question except that referred to in Yorke *v.* Grenaugh of the Exeter carrier. In 1843, there was a direct adjudication, upon the question now under consideration, in the Supreme court of Michigan, in the case of Fitch *v.* Newberry, 1 Doug. 1. The circumstances of that case were very similar to those in the present case. There the goods were diverted from the course authorized by the owner, and came to the hands of the carrier without the consent of the owner, express or implied; the carrier, however, was wholly ignorant of that, and supposed they were rightfully delivered to him; and he claimed the right to detain them until paid for the carriage. The owner refused to pay the freight, and brought an action of replevin for the goods. The decision was against the carrier. The

ceives goods from a wrongdoer, a lien thereon for freight paid a previous carrier, by whom the owner had directed them to be carried.[1]]

§ 589. The consignor or shipper is ordinarily bound to the carrier for the hire or freight of the goods,[2] [and may maintain an action against the carrier, for injury to the goods, although he has no property general or special therein.[3]] But whenever the consignee engages to pay it, he also may become responsible.[4] It is usual for bills of lading to state that the goods are to be delivered to the consignee or to his assigns, he or they paying freight; in which case the consignee and his assigns, by accepting the goods, become by implication bound to pay the freight.[5]

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general principle settled was, that if a common carrier obtain possession of goods wrongfully or without the consent of the owner, express or implied, and on demand refuse to deliver them to the owner, such owner may bring replevin for the goods or trover for their value. The case appears to have been very fully considered, and the decision is supported by strong reasoning and a very elaborate examination of authorities. A very obvious distinction was supposed to exist between the cases of carriers and innkeepers, though the distinction did not affect the determination of the case.

"This decision is supported by the case of Van Buskirk *v.* Purinton, 2 Hall, 561. There property was sold on a condition, which the buyer failed to comply with, and shipped the goods on board the defendants' vessel. On the defendants' refusal to deliver the goods to the owner, he brought trover and was allowed to recover the value, although the defendants insisted on their right of lien for the freight."]

[1] Stevens *v.* Boston & Worcester Railroad, 8 Gray, 262.

[2] Moore *v.* Wilson, 1 Term R. 659; Abbott on Shipp. P. 3, ch. 2, § 4, and note (1) to Amer. edit. 1829; Id. P. 3, ch. 7, § 4, and note (1) to Amer. edit. 1829; Barker *v.* Haven, 17 Johns. R. 237; Dougall *v.* Kemble, 3 Bing. R. 383; Moorsom *v.* Kymer, 2 Maule & Selw. R. 303; Christy *v.* Row, 1 Taunt. R. 300; Domett *v.* Beckford, 2 Nev. & Mann. R. 374; s. c. 5 Barn. & Adolph. R. 521; Shepard *v.* De Bernales, 13 East, R. 565.

[3] Blanchard *v.* Page, 8 Gray, 281, where the subject is elaborately examined by Shaw, C. J.

[4] Moore *v.* Wilson, 1 Term 659; Abbott on Shipp. P. 3, ch. 2, § 4, and note (1) to Amer. edit. 1829; Id. P. 3, ch. 7, § 4, and note (1) to Amer. edit. 1829; Barker *v.* Haven, 17 Johns. R. 237; Dougall *v.* Kemble, 3 Bing. R. 383; Moorsom *v.* Kymer, 2 Maule & Selw. R. 303; Christy *v.* Row, 1 Taunt. R. 800; Domett *v.* Beckford, 2 Nev. & Mann. R. 374; s. c. 5 Barn. & Adolph. R. 521; Shepard *v.* De Bernales, 13 East, R. 565.

[5] Abbott on Shipp. P. 3, ch. 7, § 4, 5th edit.; Dougal *v.* Kemble, 3 Bing. R. 383.

And the fact that the consignor is also liable to pay the freight, will not in such a case make any difference.[1]

ART. IX. CARRIERS OF PASSENGERS.

§ 590. Having considered the rights, duties, and obligations of carriers of goods for hire, we may now pass to the consideration of those of CARRIERS OF PASSENGERS. [The liability of such carriers, for injury to their passengers, especially where there is gross negligence, seems not to be dependent on the fact of compensation for the passage being paid to the carrier; for it has been expressly held in a recent case in the Supreme Court of the United States, that where a passenger was riding gratuitously at the invitation of the president of a railroad, and was injured by a collision, arising from the negligence of the defendants' servants, the company were liable for the injuries.[2] The liability in such case does not arise from contract, or con-

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[1] Abbott on Shipp. P. 3, ch. 7, § 4, 5th edit.; Dougal *v.* Kemble, 3 Bing. R. 383; Moorsom *v.* Kymer, 2 Maule & Selw. R. 303; Barker *v.* Haven, 17 Johns. R. 237; Domett *v.* Beckford, 5 Barn. & Ad. R. 521; s. c. 2 Nev. & Mann. R. 374; Shepard *v.* De Bernales, 13 East, R. 565.

[2] [Philadelphia & Reading Railroad Co. *v.* Derby, 14 Howard, U. S. R. 468; Nolton *v.* Western Railroad, 15 N. Y. R. 444; Steamboat New World *v.* King, 16 Howard, U. S. R. 469, and the editor's note to 1 American Railway Cases, p. 129, by Smith & Bates; Collett *v.* The London & Northwestern Railway Co. 6 Eng. Law & Eq. R. 305, clearly shows that the obligation to carry safely arises out of a public duty, and not from any contract so to do. For this reason a person who loses his baggage may sustain an action in his own name although the contract be made, and the compensation paid, by an entirely different person. Marshall *v.* York, Newcastle, & Berwick Railway Co. 7 Eng. Law and Eq. R. 519. See Gladwell *v.* Steggall, 5 Bing. N. C. 733; Pippin *v.* Sheppard, 11 Price, R. 400. In The Great Northern Railway Co. *v.* Harrison, 10 Exch. 376, and 26 Eng. Law and Eq. R. 443, a newspaper reporter travelling gratuitously, recovered damages for an injury received while on the defendants' road. See also, Malone *v.* Boston & Worcester Railroad, 22 Law Rep. 315. That the duty imposed by law, and not the mere contract, is the source of the obligation, see Thurman *v.* Wells, 18 Barb. R. 500. Still it has been held that a claim against a carrier is so far a matter of contract as to be discharged by a discharge under the bankrupt act of the U. S. of 1841. Campbell *v.* Perkins, 4 Selden, R. 430.]

sideration paid for the service; it is a duty imposed by law; and the promise to carry safely is implied from the duty, not the duty from the promise.] It has been already stated, that carriers of passengers merely for hire are subject to the same responsibility as carriers of goods for hire, at the common law, so far as respects the baggage of the passengers.[1] But as to the persons of the passengers, a different rule prevails.[2] Attempts have been made to extend their responsibility as to the persons of passengers to all losses and injuries, except those arising from the act of God, or from the public enemies. But the support of this doctrine has been uniformly resisted by the Courts, although a strict responsibility as to the carriage of the persons of passengers is imposed upon such carriers.[3] It may be useful, however, to consider, somewhat more at large than has yet been done, their duties, liabilities, and rights. And first, of PASSENGER CARRIERS ON LAND.

§ 591. (1) Their duties in the commencement of the journey. [And it has been held that the proprietors of a railroad, who received passengers, and commence their carriage at the station of another road, are bound to have a servant there to take charge of baggage, until it is placed in their cars.[4] So a railroad company which receives upon its track the cars of another company, and places them under the control of its own agents and servants, and draws them by its own locomotive to their destination, assumes toward the passengers the relation of carriers, and all the liabilities incident to that relation.[5]] The first and most general obligation on their part is to carry passengers [with all reasonable diligence,[6]] whenever they offer

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[1] Ante, § 498, 499; Dill *v.* South Carolina Railroad Co. 7 Rich. R. 158; Powell *v.* Myers, 26 Wend. R. 591, 594.

[2] Ante, § 498, 499; 1 Bell, Comm. p. 468, 475, 5th edit.; 1 Bell, Comm. § 403 to 406, 4th edit.; Camden and Amboy Railroad, &c. Co. *v.* Burke, 13 Wend. R. 611, 627, 628; Hollister *v.* Nowlen, 19 Wend. R. 234; Cole *v.* Goodwin, 19 Wend. R. 251; 2 Kent, Comm. Lect. 40, p. 600, 601, 4th edit.

[3] Aston *v.* Heaven, 2 Esp. R. 533; Farish *v.* Reigle, 11 Gratt. R. 697; Fairchild *v.* California Stage Co. 13 Calif. R. 602.

[4] Jordan *v.* The Fall River Railroad Co. 5 Cush. 69.

[5] Schopman *v.* Boston & Worcester Railroad, 9 Cush. 24.

[6] [Weed *v.* Panama Railroad Co. 17 N. Y. R. 362. And the wilful delay of

themselves, and are ready to pay for their transportation.[1] This results from their setting themselves up, like innkeepers, and common carriers of goods, for a common public employment on hire.[2] They are no more at liberty to refuse a passenger, if they have sufficient room and accommodations, than an innkeeper is to refuse suitable room and accommodations to a guest.[3] [And upon an unconditional contract to carry, it seems they are bound to provide room for all.[4]] If several persons have contracted to go in company inside, the carriers have no right to separate them into different parts of the coach, outside and inside.[5]

§ 591 *a*. But although passenger carriers are thus bound to carry passengers, the duties of the former, as well as the rights of the latter, have certain prescribed limits and implied qualifications. Thus, for example, the passengers are bound to submit to such reasonable regulations as the proprietors may adopt for the convenience and comfort of the other passengers, as well as for their own proper interests.[6] The importance of this doctrine is felt more strikingly in cases of steamboats and railroad cars.* In a recent case of a steamboat passenger the question came directly before the Court; and it was then said: "There is no doubt, that this steamboat is a common carrier of passengers for hire; and, therefore, the defendant, as com-

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the carrier's agents is no excuse for a detention. If a passenger is detained on the way, contrary to the published time tables of the company, he may recover such sum as damages, as he was compelled to pay to reach the end of his journey at the advertised time. But if he voluntarily remains over until the next day, and thereby fails to meet his appointments with his customers, the carriers are not responsible for damages thus caused. Hamlin *v.* Great Northern Railway, 1 Hurl. & Norm. 408.]

[1] Jencks *v.* Coleman, 2 Sumner, R. 221, 224. And see Benett *v.* The Peninsular, &c. Co. 6 Mann., Gr. & Sc. R. 775.

[2] Ibid.

[3] Bretherton *v.* Wood, 3 Brod. & Bing. R. 54; s. c. 9 Price, R. 408; s. c. 6 Moore, R. 141; Ansell *v.* Waterhouse, 2 Chitty, R. 1; Massiter *v.* Cooper, 4 Esp. R. 260; 1 Bell, Comm. p. 462, 5th edit.

* Hawcroft *v.* The Great Northern Railw. Co. 8 Eng. Law and Eq. R. 362.

[5] Long *v.* Horne, 1 Carr. & Payne, R. 610.

[6] See Galena, &c., R. R. Co. *v.* Yarwood, 15 Illinois R. 472; Day *v.* Owen, 5 Mich. 520.

mander, was bound to take the plaintiff as a passenger on board, if he had suitable accommodations, and there was no reasonable objection to the character or conduct of the plaintiff. The question, then, really resolves itself into the mere consideration, whether there was in the present case, upon the facts, a reasonable ground for the refusal. The right of passengers to a passage on board of a steamboat is not an unlimited right. But it is subject to such reasonable regulations as the proprietors may prescribe, for the due accommodation of passengers, and for the due arrangement of their business. The proprietors have not only this right, but the further right to consult and provide for their own interests in the management of such boats, as a common incident to their right of property. They are not bound to admit passengers on board, who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct; or who make disturbances on board; or whose characters are doubtful or dissolute or supicious; and, *a fortiori*, whose characters are unequivocally bad. Nor are they bound to admit passengers on board, whose object it is to interfere with the interests or patronage of the proprietors, so as to make the business less lucrative to them. While, therefore, I agree, that steamboat proprietors, holding themselves out as common carriers, are bound to receive passengers on board, under ordinary circumstances, I at the same time insist that they may refuse to receive them if there be a reasonable objection. And, as passengers are bound to obey the orders and regulations of the proprietors, unless they are oppressive and grossly unreasonable, whoever goes on board, under ordinary circumstances, impliedly contracts to obey such regulations; and may justly be refused a passage, if he wilfully resists or violates them." [1]

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[1] Jencks *v.* Coleman, 2 Sumner, R. 224, 225. After these remarks, the Court proceeded to say: "Now, what are the circumstances of the present case? Jencks (the plaintiff) was at the time the known agent of the Tremont line of stage-coaches. The proprietors of the Benjamin Franklin (the steamboat) had, as he well knew, entered into a contract with the owners of another line (the Citizens Stage-coach Company) to bring passengers from Boston to Providence, and to carry passengers from Providence to Boston, in connection with and to

[§ 591 *b*. So passengers on a railroad are bound to conform to a regulation of the company requiring passengers to exhibit

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meet the steamboats plying between New York and Providence, and belonging to the proprietors of The Franklin. Such a contract was important, if not indispensable to secure uniformity, punctuality, and certainty in the carriage of passengers on both routes; and might be material to the interests of the proprietors of those steamboats. Jencks had been in the habit of coming on board these steamboats at Providence, and going therein to Newport; and commonly of coming on board at Newport, and going to Providence, avowedly for the purpose of soliciting passengers for the Tremont Line, and thus interfering with the patronage intended to be secured to the Citizens Line, by the arrangements made with the steamboat proprietors. He had the fullest notice, that the steamboat proprietors had forbidden any person to come on board for such purposes, as incompatible with their interests. At the time when he came on board, as in the declaration mentioned, there was every reason to presume that he was on board for his ordinary purposes as agent. It has been said, that the proprietors had no right to inquire into his intent or motives. I cannot admit that point. I think that the proprietors had a right to inquire into such intent and motives, and to act upon the reasonable presumptions which arose in regard to them. Suppose a known or suspected thief were to come on board, would they not have a right to refuse him a passage? Might they not justly act upon the presumption that his object was unlawful? Suppose a person were to come on board, who was habitually drunk, and gross in his behavior, and obscene in his language, so as to be a public annoyance; might not the proprietors refuse to allow him a passage? I think they might, upon the just presumption of what his conduct would be. It has been said by the learned counsel for the plaintiff, that Jencks was going from Providence to Newport, and not coming back; and that in going down, there would, from the very nature of the object be no solicitation of passengers. That does not necessarily follow; for he might be engaged in making preliminary engagements for the return of some of them back again. But supposing there were no such solicitations, actual or intended, I do not think the case is essentially changed. I think that the proprietors of the steamboat were not bound to take a passenger from Providence to Newport, whose object was, as a stationed agent of the Tremont Line, thereby to acquire facilities, to enable him successfully to interfere with the interests of these proprietors, or to do them an injury in their business. Let us take the case of a ferryman. Is he bound to carry a passenger across a ferry, whose object is to commit a trespass upon his lands? A case, still more strongly in point, and which, in my judgment, completely meets the present, is that of an innkeeper. Suppose passengers are accustomed to breakfast, or dine, or sup at his house, and an agent is employed by a rival house, at a distance of a few miles, to decoy the passengers away the moment they arrive at the inn; is the innkeeper bound to entertain and lodge such an agent, and thereby enable him to accomplish the very objects of his mission, to the injury or ruin of his own interests?

their tickets, when requested by the conductor; and if they do not so conform, they may legally be ejected from the the train, no unnecessary violence being used.[1] The reasonableness of a regulation requiring any passengers on a railroad to surrender their tickets before reaching their destination, without receiving any check or other evidence of a payment of the fare, is a question of law for the Court, and not of fact for the Jury; and it seems such a regulation is valid.[2] So they may prescribe reasonable regulations against passengers leaving a train and completing their journey in a succeeding train, and as to procuring tickets before taking seats in the train.[3]]

§ 592. In the next place, they are bound to provide coaches reasonably strong and sufficient for the journey, with suitable

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I think not. It has been also said, that the steamboat proprietors are bound to carry passengers only between Providence and New York, and not to transport them to Boston. Be it so, that they are not absolutely bound. Yet they have a right to make a contract for this latter purpose, if they choose; and especially if it will facilitate the transportation of passengers, and increase the patronage of their steamboats. I do not say, that they have a right to act oppressively in such cases. But, certainly, they may in good faith make such contracts, to promote their own, as well as the public interests. The only real question, then, in the present case, is, whether the conduct of the steamboat proprietors has been reasonable and *bonâ fide*. They have entered into a contract with the Citizens' Line of coaches, to carry all their passengers to and from Boston. Is this contract reasonable in itself; or is it designed to create an oppressive and mischievous monopoly? There is no pretence to say, that any passenger in the steamboat is bound to go to or from Boston in the Citizens' Line. He may act as he pleases. It has been said by the learned counsel for the plaintiff, that free competition is best for the public. But that is not the question here. Men may reasonably differ from each other on that point. Neither is the question here, whether the contract with the Citizens' line was indispensable, or absolutely necessary, in order to insure the carriage of the passengers to and from Boston. But the true question is, whether the contract is reasonable and proper in itself, and entered into with good faith, and not for the purpose of an oppressive monopoly. If the Jury find the contract to be reasonable and proper in itself, and not oppressive, and they believe the purpose of Jencks in going on board was to accomplish the objects of his agency, and in violation of the reasonable regulations of the steamboat proprietors, then their verdict ought to be for the defendant; otherwise to be for the plaintiff."

[1] Hibbard *v.* N. Y. & Erie Railroad, 15 N. Y. R. 455.

[2] Vedder *v.* Fellows, 20 N. Y. R. 126.

[3] Cleveland Railroad *v.* Bartram, 11 Ohio, St. R. 457.

harness, trappings, and equipments; and to make a proper examination thereof previous to each journey.[1] In other terms, they are bound to provide road-worthy vehicles, suitable for the safe transportation of the passengers. If they fail in any of these particulars, and any damage or injury occurs to the passengers, they will be responsible to the full extent thereof.[2] Hence, it has been held, that, if there is any defect in the original construction of a stage-coach, as, for example, in an axle-tree, although the defect be out of sight, and not discoverable upon a mere ordinary examination, yet if the defect might be discovered by a more minute examination, and any damage is occasioned to a passenger thereby, the coach proprietors are answerable therefor.[3] [But if, on the other hand, the injury arises from a hidden defect, which could not be discovered by the most careful and thorough examination, such as a small flaw in the interior of an iron axle-tree, which was entirely surrounded by sound iron, it has been held in a recent case that the coach proprietors are not liable.[4]] The same rule will

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[1] Bremner *v.* Williams, 1 Carr. & Payne, R. 414; Crofts *v.* Waterhouse, 3 Bing. R. 321; Jones *v.* Boyce, 1 Stark. R. 493; Christie *v.* Griggs, 2 Camp. R. 80; 1 Bell, Comm. 462, 5th edit.; Sharp *v.* Grey, 9 Bing. R. 457; Camden and Amboy Railroad, &c. Co. *v.* Burke, 13 Wend. R. 611, 627, 628; Ante, § 509, 562, 571 *a*.

[2] Aston *v.* Heaven, 2 Esp. R. 533; 1 Bell, Comm. 462, 463, 5th edit.; Sharp *v.* Grey, 9 Bing. R. 457; Camden and Amboy Railroad, &c. Co. *v.* Burke, 13 Wend. R. 611, 627, 628. See New Jersey Railroad, &c. Co. *v.* Kennard, 9 Harris (Penn.), R. 203; Farish *v.* Reigle, 11 Grattan, R. 697; Derwort *v.* Loomer, 21 Conn. R. 246; Sullivan *v.* Philadelphia Railroad, 6 Casey, R. 234; Nashville, &c. R. R. Co. *v.* Messino, 1 Sneed, R. 221.

[3] Sharp *v.* Grey, 9 Bing. R. 457; Christie *v.* Griggs, 2 Camp. R. 80; Hegeman *v.* Western R. R. Co. 16 Barbour, R. 353; and 3 Kern. 9; Galena, &c. R. R. Co. *v.* Yarwood, 15 Ill. R. 468; Frink *v.* Potter, 17 Ill. R. 406.

[4] [Ingalls *v.* Bills, 9 Metc. R. 1. Hubbard, J., said: "It is contended by the counsel for the plaintiff, that the proprietor of a stage-coach is held responsible for the safe carriage of passengers so far that he is a warrantor that his coach is road-worthy, that is, is absolutely sufficient for the performance of the journey undertaken; and that if an accident happens, the proof of the greatest care, caution, and diligence, in the selecting of the coach, and in the preservation of it during its use, will not be a defence to the owner; and it is insisted that this position is supported by various authorities. The cases, among many others cited, which are more especially relied upon, are those of Israel *v.* Clark,

apply to any other latent defect, which might be discovered by more minute examination and more exact diligence, whereby

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4 Esp. R. 259; Crofts *v.* Waterhouse, 3 Bing. 319; Bremner *v.* Williams, 1 Car. & P. 414; and Sharp *v.* Grey, 9 Bing. 457. If these cases do uphold the doctrine for which they are cited, they are certainly so much in conflict with other decided cases, that they cannot be viewed in the light of established authorities. But we think, upon an examination of them and comparing them with other cases, they will not be found so clearly to sustain the position of the plaintiff, as has been argued.

"It must be borne in mind, that the carrying of passengers for hire, in coaches, is comparatively a modern practice; and that though suits occur against owners of coaches, for the loss of goods, as early as the time of Lord Holt, yet the first case of a suit to recover damages by a passenger, which I have noticed, is that of White *v.* Boulton, Peake's Cas. 81, which was tried before Lord Kenyon in 1791, and published in 1795. That was an action against the proprietors of the Chester mail-coach for the negligence of the driver, by reason of which the coach was overturned, and the plaintiff's arm broken, and in which he recovered damages for the injury; and Lord Kenyon, in delivering his opinion, said: 'when these [mail] coaches carried *passengers*, the proprietors of them were bound to carry them safely and properly.' The correctness of the opinion cannot be doubted, in its application to a case of negligence. The meaning of the word 'safely,' as used in declarations for this species of injury, is given hereafter.

"The next case which occurred was that of Aston *v.* Heaven, 2 Esp. R. 533, in 1797, which was against the defendants, as proprietors of the Salisbury stage-coach, for negligence in the driving of their coach, in consequence of which it was overset and the plaintiff injured. This action was tried before Eyre, C. J. It was contended by the counsel for the plaintiff, that coach-owners were liable in all cases, except where the injury happens from the act of God or of the king's enemies; but the learned Judge held that cases of loss of goods by carriers were totally unlike the case before him. In those cases, the parties are protected by custom; but as against carriers of persons, the action stands alone on the ground of negligence.

"The next case was that of Israel *v.* Clark, 4 Esp. R. 259, in 1803, where the plaintiff sought to recover damages for an injury arising from the overturning of the defendant's coach, in consequence of the axle-tree having broken; and one count alleged the injury to have arisen from the overloading of the coach. It was contended that if the owners carried more passengers than they were allowed by act of Parliament, that should be deemed such an overloading. To this Lord Ellenborough, who tried the cause, assented, and said, 'if they carried more than the statute allowed, they were liable to its penalties; but they might not be entitled to carry so many; it depended on the strength of the carriage. They were bound by law to provide sufficient carriages for the safe conveyance of the public who had occasion to travel by

the work is not road-worthy, and a damage thereby occurs to any passenger. In this respect, there does not seem to be

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them. At all events, he would expect a clear land-worthiness in the carriage itself to be established.' This is one of the cases upon which the present plaintiff specially relies. It was a *nisi prius* case, and it does not appear upon which count the Jury found their verdict. But the point pending in the present case was neither discussed nor started, namely, whether the accident arose from the negligence of the owner in not providing a coach of sufficient strength, or from a secret defect not discoverable upon the most careful examination. No opinion was expressed whether the action rests upon negligence or upon an implied warranty. But it was stated that the defendants were bound by law to provide sufficient carriages for the passage, and, at all events, that there should be a clear land-worthiness in the carriage itself.

"The general position is not denied with regard to the duty of an owner to provide safe carriages. The duty, however, does not in itself import a warranty. The Judge himself may have used stronger expressions, in the terms, 'land-worthiness in the carriage,' than he intended by the thought of seaworthiness in a ship, and the duty of ship-owners in that respect. If the subject had been discussed, and the distinctions now presented had been raised, and then the opinion had followed, as expressed in the report, it would be entitled to much more consideration than the mere strength of the words now impart to it.

"The next case was that of Christie *v.* Griggs, 2 Campb. 80, in 1809. There the axle-tree of the coach snapped asunder at a place where there was a slight descent from the kennel crossing the road, and the plaintiff was thrown from the top of the coach. Sir James Mansfield, in instructing the Jury, said: 'As the driver had been cleared of negligence, the question for the Jury was as to the sufficiency of the coach. If the axle-tree was sound, as far as human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods and a contract to carry passengers. For the goods, the carrier was answerable at all events, but he did not warrant the safety of the passengers. His undertaking as to them went no further than this, that, as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered.

"The case of Bremner *v.* Williams, 1 Car. & P. 414, in 1824, is relied on by the plaintiff. There, Best, C. J., said he considered that 'every coach proprietor warrants to the public that his stage-coach is equal to the journey it undertakes, and that it is his duty to examine it previous to the commencement of every journey.' And so, in Crofts *v.* Waterhouse, 3 Bing. 321, in 1825, Best, C. J., said: 'The coachman must have competent skill, and use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of suffi-

any difference between the case of a coach which is not road-worthy, and of a ship which is not seaworthy, as to the implied obligations of the owner.[1]

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cient strength, and properly made; and also with lights by night. If there be the least failure in any one of these things the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens.' But though this language is strong, and would apparently import a warranty, on the part of the stage proprietor, as to the sufficiency of his coach, yet, Park, J., in the same case said, 'a carrier of passengers is only liable for negligence.' This shows that the Court did not mean to lay down the law, that a stage proprietor is in fact a warrantor of the sufficiency of his coach and its equipments, but that he is bound to use the utmost diligence and care in making suitable provision for those whom he carries; and we think such a construction is warranted by the language of the same learned Judge (Best), in the case of Harris *v.* Costar, 1 Car. & P. 636, in 1825, where the averment in the declaration was, that the defendant undertook to carry the plaintiff *safely*. The Judge held that it did not mean that the coach proprietor undertook to convey safely absolutely, but that it was to be construed like all other instruments, taking the whole together, and meant that the defendants were to use due care.

"But the case mainly relied upon by the plaintiff is that of Sharp *v.* Grey, 9 Bing. 457, where the axle-tree of a coach was broken and the plaintiff injured. There the axle was an iron bar inclosed in a frame of wood of four pieces, secured by clamps of iron. The coach was examined, and no defect was obvious to the sight. But after the accident, a defect was found in a portion of the iron bar, which could not be discovered without taking off the wood-work; and it was proved that it was not usual to examine the iron under the wood work, as it would rather tend to insecurity than safety. It does not appear by the statement, that the defect could not have been seen, on taking off the wood work; but it would rather seem that it might have been discovered. However that may be, the language of different Judges in giving their opinions, is relied upon as maintaining the doctrines contended for by the plaintiff. Gaselee, J., held that 'the burden lay on the defendant to show there had been no defect in the construction of the coach.' Bosanquet, J., said, 'the Chief Justice' (who tried the case) 'held that the defendant was bound to provide a safe vehicle, and the accident happened from a defect in the axle-tree. If so, when the coach started, it was not road-worthy, and the defendant is liable for the consequence, upon the same principle as a ship-owner who furnishes a vessel

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[1] Sharp *v.* Grey, 9 Bing. R. 457. See also, Dig. Lib. 19, tit. 2, l. 19, § 1; Pothier, Pand. Lib. 19, tit. 2, n. 63. See Christie *v.* Griggs, 2 Camp. R. 80; Camden and Amboy Railroad, &c. Co. *v.* Burke, 13 Wend. R. 611, 627; Hollister *v.* Nowlen, 19 Wend. R. 234; Cole *v.* Goodwin, 19 Wend. R. 251.

§ 593. In the next place, they are bound to provide careful drivers, of reasonable skill and good habits, for the jour-

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which is not seaworthy.' And Alderson, J., said he was of the same opinion, and that 'a coach proprietor is liable for all defects in his vehicle, which can be seen at the time of construction, as well as for such as may exist afterwards, and be discovered on investigation. The injury in the present case appears to have been occasioned by an original defect or construction; and if the defendant was not responsible, a coach proprietor might buy ill-constructed or unsafe vehicles, and his passengers be without remedy.'

"This case goes far to support the plaintiff in the doctrine contended for by his counsel, as it would seem to place the case upon the ground that the coach proprietor must, at all events, provide a coach absolutely and at all times sufficient for the journey, and that he is a warrantor to the passenger to provide such a coach. But we incline to believe the learned Judges gave too much weight to the comparison of Bosanquet, J., namely, that a coach must be roadworthy on the same principle that a ship must be seaworthy. We think the comparison is not correct, and that the analogy applies only where goods are carried, and not where passengers are transported. And no case has been cited, where a passenger has sued a ship-owner for an injury arising to him personally in not conducting him in a seaworthy ship. If more was intended by the learned Court, than that a coach proprietor is bound to use the greatest care and diligence in providing suitable and sufficient coaches, and keeping them in a safe and suitable condition for use, we cannot agree with them in opinion. To give their language the meaning contended for in the argument of the case at bar is, in fact, to place coach proprietors in the same predicament with common carriers, and to make them responsible, in all events, for the safe conduct of passengers so far as the vehicle is concerned. But that the case of Sharp *v.* Grey, is susceptible of being placed on the ground, which we think tenable, namely, that negligence and not warranty lies at the foundation of actions of this description, may be inferred from the language of Mr. Justice Park, who, in giving his opinion, says, 'This was entirely a question of fact. It is clear that there was a defect in the axle-tree; and it was for the Jury to say whether the accident was occasioned by what, in law, is called negligence in the defendant, or not.' And Tindal, C. J., who tried the cause before the Jury, left it for them to consider whether there had been that vigilance which was required by the defendant's engagement to carry the plaintiff safely; thus apparently putting the case on the ground of negligence and not of warranty. See also, Bretherton *v.* Wood, 3 Brod. & Bing. 54, and 6 Moore, 141; Ansell *v.* Waterhouse, 6 M. & S. 385, and 2 Chit. R. 1.

"The same question has arisen in this country, and the decisions exhibit a uniformity of opinion that coach proprietors are not liable as common carriers, but are made responsible by reason of negligence. In the case of Camden & Amboy Railroad Co. *v.* Burke, 13 Wend. 626, the Court say that the proprietors of public conveyances are liable at all events for the baggage of passengers;

ney; and to employ horses which are steady, and not vicious, or likely to endanger the safety of the passenger.[1] In the

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but as to injuries to their persons, they are only liable for the want of such care and diligence as is characteristic of cautious persons. And in considering the subject again in the case of Hollister *v.* Nowlen, 19 Wend. 236, they say, that 'stage-coach proprietors, and other carriers by land and water, incur a very different responsibility in relation to the *passenger* and his *baggage*. For an injury to the passenger, they are answerable only where there has been a want of proper care, diligence, or skill; but in relation to baggage, they are regarded as insurers, and must answer for any loss not occasioned by inevitable accident or the public enemies.'

"In a case which occurred in respect to the transportation of slaves (Boyce *v.* Anderson, 2 Pet. 155), Chief Justice Marshall, in giving the opinion of the Court, says: 'The law applicable to common carriers, is one of great rigor. Though to the extent to which it has been carried, and in cases to which it has been applied, we admit its necessity and policy, we do not think it ought to be carried further, or applied to *new cases*. We think it has not been applied to living men, and that it ought not to be applied to them.' So in the case of Stokes *v.* Saltonstall, 13 Pet. 181, the question arose and was thoroughly discussed; and the same opinions are maintained as in the cases above cited from Wendell. And the whole subject is examined by Judge Story, in his Treatise on Bailments, §§ 592–600, with his usual learning; and his result is the same.

"If there is a discrepancy between the English authorities which have been cited, we think the opinions expressed by Chief Justice Eyre and Chief Justice Mansfield are most consonant with sound reason, as applicable to a branch of the law comparatively new, and, though given at *nisi prius*, are fully sustained by the discussions which the same subject has undergone in the courts of our own country. We have said, as being most consonant with sound reason, or good common sense, as applied to so practical a subject; because, if such a warranty were imposed by force of law upon the proprietors of coaches and other vehicles for the conveyance of passengers, they would in fact become the warrantors of the work of others, over whom they have no actual control, and — from the number of artisans employed in the construction of the materials of a single coach — whom they could not follow. Unless, therefore, by the

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[1] Waland *v.* Elkins, 1 Stark. R. 272; Christie *v.* Griggs, 2 Camp. R. 79; Harris *v.* Costar, 1 Carr. & Payne, R. 636; Crofts *v.* Waterhouse, 3 Bing. R. 321; Stokes *v.* Saltonstall, 13 Peters, R. 181; Hall *v.* Connecticut R. Steamboat Co. 13 Connect. R. 319; Farish *v.* Reigle, 11 Gratt. R. 708; Stockton *v.* Frey, 4 Gill, R. 406; Derwort *v.* Loomer, 21 Conn. R. 246; Caldwell *v.* Murphy, 1 Duer (N. Y.), R. 233; Fairchild *v.* California Stage Co. 13 Calif. R. 603.

pithy language of an eminent Judge, it may be said, that "the coachman must have competent skill; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength and properly made, and also with lights by night. If

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application of a similar rule, every workman shall be held as the warrantor, in all events, of the strength, sufficiency, and adaptation of his own manufactures to the uses designed — which, in a community like ours, could not be practically enforced — the warranty would really rest on the persons purchasing the article for use, and not upon the makers.

"If it should be said that the same observations might be applied to shipowners, the answer might be given, that they have never been held as the warrantors of the safety of the passengers whom they conveyed; and as to the transportation of goods, owners of general ships have always been held as common carriers, for the same reasons that carriers on land are bound for the safe delivery of goods intrusted to them. But as it respects the sea-worthiness of a ship, the technical rules of law respecting it have been so repeatedly examined, and the facts upon which they rest so often investigated, that the questions which arise are those of fact and not of law, and in a vast proportion of instances depend upon the degree of diligence and care which are used in the preservation of vessels, and practically resolve themselves into questions of negligence; so that the evils are very few that arise from the maintenance of the doctrine that a ship must be seaworthy in order to be the subject of insurance.

"The result to which we have arrived, from the examination of the case before us, is this: That carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, in order to prevent those injuries which human care and foresight can guard against; and that if an accident happens from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger, happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense. And we are of opinion that the instructions, which the defendants' counsel requested might be given to the Jury in the present case, were correct in point of law, and that the learned Judge erred in extending the liability of the defendants further than was proposed in the instructions requested."]

there is the least failure in any of those things, the duty of the coach proprietors is not fulfilled, and they are responsible for any injury or damage that happens." [1]

§ 594. In the next place, they are bound not to overload the coach either with passengers or with luggage; and they are to take care that the weight is suitably adjusted so that the coach is not top-heavy and made liable to overset.[2] [And a custom and usage of so overloading their coaches, with freight, luggage, or passengers, is no excuse for the act.[3]]

§ 595. In the next place, they are bound to receive and to take care of the usual luggage or baggage,[4] which it is cus-

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[1] Per Best, C. J., in Crofts *v.* Waterhouse, 3 Bing. R. 321; 1 Bell, Comm. p. 462, 5th edit.; Fuller *v.* Talbot, 23 Ill. R. 357.

[2] Long *v.* Horne, 1 Carr. & Payne, R. 612; Israel *v.* Clark, 4 Esp. 259; Aston *v.* Heaven, 2 Esp. R. 533; Heard *v.* Mountain, 5 Petersd. Abr. *Carriers*, p. 54; 1 Bell, Comm. p. 462, 5th edit.; Farish *v.* Reigle, 11 Gratt. R. 798.

[3] Derwort *v.* Loomer, 21 Conn. R. 246.

[4] [By a railway act it was enacted, "That, without extra charge, it should be lawful for any passenger travelling upon or along the said railway to take with him his articles of clothing not exceeding forty pounds in weight, and four cubic feet in dimensions; and that the said company should in no case be in any way liable or responsible for the safe carriage or custody of, or for any loss of or injury to any articles, matters or things whatsoever, carried upon or along the said railway with or accompanying the person of or belonging to any passenger, or delivered for the purpose of being carried, other than and except such passenger's articles of clothing not exceeding the weight and dimensions aforesaid."

Pursuant to the powers conferred upon them by the act, the company made certain rules and regulations as to passengers' luggage; amongst others, one requiring it to be labelled, and declaring that they would not be responsible for the loss or detention of articles not labelled and properly addressed, — and another declaring, that all unclaimed property found on their premises or in their carriages, should be deposited in a place called the lost property office, and restore to the owner on payment of a fee of 6*d.* for each article. In addition to these regulations, the company gave private instructions to their servants, to the effect that "no small articles, such as rugs, coats, umbrellas, sticks, caps, or small paper parcels, nor bundles of rugs, coats and wrappers strapped together, are to be labelled or placed in the luggage-van; the passengers must take charge of such articles themselves, or send them as booked parcels."

The plaintiff, a passenger upon the railway, required one of the company's porters to label and place in the luggage-van, a package (within the stipulated weight and dimensions) consisting of articles of wearing apparel, and wrapped

tomary to allow every passenger to carry for the journey.[1] The luggage or baggage is (as we have seen) at the risk of the proprietors of the coach, or steamboat, or rail-car, during the transportation, with the same exceptions only of losses by inevitable accident and by the public enemies, which apply to common carriers of goods on land.[2] At the end of the journey, they are bound to make a right and true delivery of the luggage or baggage of the passengers; and, indeed, this is a very easy duty, by the exercise of ordinary care in marking the luggage or baggage, entering it on the way-bill, and delivering a checked ticket to the owner.[3] [And if a railway company employ porters at the end of their line to carry passenger's luggage from the station to the coaches or other vehicles, which carry away the passenger, the liability of the company continues until the luggage is deposited in such coach.[4]] The mere fact,

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in a shawl fastened with a strap, and properly addressed. The porter refused to label the package, and insisted upon placing it in the carriage with the plaintiff. The plaintiff declined to allow this, unless it was at the company's risk. The package was left behind, and was afterwards taken to the lost property office, where it was detained, and 6*d.* demanded for its restoration: — Held, that the company were not justified in refusing to carry the package at their own risk and were responsible for its detention. It seems that, if the company had been justified in refusing to carry the parcel, they might have been justified in taking it to the lost property office. Munster *v.* South-eastern Railway Co. 4 J. Scott (N. S.), 676.]

[1] Robinson *v.* Dunmore, 2 Bos. & Pull. R. 419; Ante, § 499.

[2] Ante, § 498, 499.

[3] Cole *v.* Goodwin, 19 Wend. R. 251, 254, 255, 256.

[4] [See Richards *v.* London, Brighton, &c. Railway Co. 7 Man., Gr. & Scott, R. 839; Butcher *v.* The London and South-western Railway Co. 29 Eng. Law & Eq. R. 347, 16 C. B. 13. In the latter case, the plaintiff was a passenger by railway from F. to W. bringing with him as luggage a small carpet bag, which was placed in the carriage he rode in. On the arrival of the train at W. station, the plaintiff got out upon the platform, with the bag in his hand, and it was taken from him by a railway porter to be placed in one of the cabs which were standing in the station. In an action against the railway company for the loss of the bag, it was proved that the plaintiff never saw the bag again after the porter had so taken it from him, and that the porter was unable to find it. It was also proved to be the practice of the railway company, for their porters to assist in carrying the passengers' luggage, on the arrival of a train, to the cabs in the station. It was held, that there was evidence of the railway com-

that the coach or carrier steamboat has arrived at its proper place of destination, or the end of the journey, with the baggage in safety, will not discharge the carriers until it is delivered to the owner, even if he be not then ready or present to receive it; for the carriers are bound to keep for a reasonable time, and until called for, although if not called for in a reasonable time, their liability as common carriers will cease, and that of ordinary bailees may only arise.[1]

[§ 595 *a*. In the next place, railway carriers are generally bound to run trains according to their advertised time tables, as was adjudged in a recent case in the Queen's Bench. The facts were, that the plaintiff being in London in March, 1855, and having business at Peterborough on the 25th of March, 1855, and at Hull on the 26th, consulted the printed time tables issued in the usual way by the defendants for that month. In these time tables a train was advertised to leave London at 5, P. M., and reach Peterborough about 7, P. M., and thence to proceed, amongst other towns, to Hull, to arrive there about midnight. At the bottom of the time tables was the following notice: "The companies make every exertion that the trains shall be punctual, but their arrival or departure at the times stated will not be guarantied, nor will the companies hold themselves responsible for delay or any consequences arising therefrom." The time tables advertising this train were, till after the 26th of March, exhibited by the defendants at their stations, where the plaintiff had seen them, and were printed and circulated; and on the 25th of March the plaintiff had one in his possession. The plaintiff, having made his arrangements on the faith of these time tables, went down to Peterborough by an early train of the defendants, transacted his business at Peterborough, and went to the defendants'

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pany having contracted to deliver the plaintiff's bag to a cab in the station, and of their not having performed such contract. And in the same case it was also adjudged, that whether the plaintiff had accepted a delivery of the bag on the platform, or elsewhere, in lieu of such delivery to a cab, was a question of fact for a Jury to determine. See Midland Railway Co. *v.* Bromley, 17 C. B. 372.]

[1] Powels *v.* Myers, 26 Wend. R. 591.

station at Peterborough in due time to take a ticket to Hull by the evening train so advertised; but there was no such train to Hull, nor had there been one during any part of the month of March. The explanation of this was, that the whole line of railway from Peterborough to Hull was not the property of the defendants, their line ending at Askerne on the route from Peterborough to Hull. They had running powers over the line of The Lancashire and Yorkshire Railway Company from Askerne to Milford Junction, where the line of The North-eastern Railway Company joins that of The Lancashire and Yorkshire Railway company. There had been, in February, an arrangement between the three companies by which passengers booked at the stations on the line of the Great Northern Railway Company were carried in the carriages of that company to Milford Junction, and thence were conveyed by the North-eastern Railway Company to Hull by a train departing a few minutes after the arrival of the train leaving Peterborough about 7, P. M. Toward the end of February, prior to the publication by the defendants of their time tables, but after they had been prepared and printed, The North-eastern Railway Company gave notice to the defendants that after the first day of March, the train from Milford Junction to Hull would be discontinued. The defendants nevertheless made no alteration in their time tables, which were published and issued for March. The plaintiff consulted them and was misled as above-stated. In consequence of the absence of this train, the plaintiff could not get to Hull in time for an appointment which he had made for the morning of the 26th of March, and sustained damage to the amount of 5*l.* 10*s.* It did not appear by the time tables whether the train from Peterborough to Hull was or was not entirely under the control of the defendants. It was held that the plaintiff was entitled to recover.[1]]

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[1] [Denton *v.* Great Northern Railway Co. 34 Eng. Law & Eq. 154, and 5 El. & Bl. 860. Lord Campbell, C. J., there said: "This is a case of some importance, both as regards the public and the railway companies. It seems to me that the representations made by railway companies in their time tables cannot be treated as mere waste paper, and in the present case I think the plaintiff is entitled to recover, on the ground that there was a contract with

§ 596. And in all these cases they are not only personally bound for their own acts, but for the acts of their servants and

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him, and also on the ground that there was a false representation by the company.

"It seems to me that, if the company promised to give tickets for a train, running at a particular hour to a particular place, to any one who would come to the station and tender the price of the ticket, it is a good contract with any one who so comes. I take it to be clear that the issuing of the time tables in this way amounts, in fact, to such a promise; any one who read them would so understand them. Then, is it a good contract in law? The consideration is one which is a prejudice to the person who makes his arrangements with a view to the fulfilment of the contract, and comes to the station on the faith of it. Is it not, then, within the principle of those cases in which it has been held that an action lies on a contract to pay a reward? There the promise is to the public at large, exactly as it is here; it is, in effect, the same as if made to each individual conditionally; and, on an individual fulfilling the condition, it is an absolute contract with him, and he may sue. It is immaterial that the defendants are not owners of the line the whole way to Hull. It is admitted to have been often rightly held, that, where there is a ticket taken out to go to a station, the contract binds the company issuing the ticket, though it is not specified how much of the line over which the journey is to be, belongs to that company. Then reliance is placed on that class of cases which decide that an absolute contract must be fulfilled, whatever happens, which, it is said, shows that there cannot be a contract here. But, from the nature of the contract, I think there might be implied exceptions. A carrier by sea excepts the perils of the sea. It may be, from the nature of this contract, that the perils of the railroad are excepted. I see no inconvenience likely to arise from holding this a contract. It is put, as an example of inconvenience, that a ship-owner, who has advertised that his ship is bound for Calcutta, as a general ship, and that he will take on board goods brought to her, would be liable to an action if, when goods were brought on the faith of the advertisement, he said he had got a better freight and was now bound for Jamaica; but I see no reason why he should not be liable. It seems to me, therefore, that this is a contract, and that the plaintiff, who has acted on it, has his remedy on that ground. But on the other ground there is no doubt. The statement in the time tables was untrue, and was made so as to be what the law calls a fraudulent representation. It was not the original printing that was blamable; but, after notice that the train was withdrawn, the defendants continue, down to the 25th of March, to issue these tables. Was not that a representation that there was such a train? And, as they knew it had been discontinued for some time, was it not a false representation? It is all one as if a person, duly authorized by the company, had, knowing it was not true, said to the plaintiff: 'There is a train from Milford Junction to Hull at that hour.' The plaintiff believes this, acts upon it, and sustains loss. It is well established law, that, where a person

agents in their employ, and also, in cases of partnership, for the acts of their partners.[1]

§ 597. (2) Their duties on the progress of the journey. Passenger-carriers are bound to stop at the usual places, and to allow the usual intervals for refreshment of the passengers; and they cannot at their mere caprice vary or annul these accommodations; for every passenger is understood to contract for the usual reasonable accommodations.[2] [They are bound to stop at all way-stations sufficient time for all passengers to alight to whom they have sold tickets for that station, and they are liable if a passenger is injured in consequence of the starting of the train prematurely.[3] If they expressly contract to land a passenger at a particular point, the danger of doing so will not excuse them from performance.[4]]

§ 598. They are bound to make use of all the ordinary precautions for the safety of passengers on the road.[5] This involves a consideration of the duties of the coachman in driving on the road. If he is guilty of any rashness, negligence, or misconduct, or if he is unskilful, or deviates from the acknowledged custom of the road, the proprietors will be responsible for any injury resulting from his acts.[6] Thus, if the coachman drives with reins so loose that he cannot govern his horses, the proprietors of the coach will be answerable.[7] So, if there is danger in any part of the road, or in a particular passage, and he omits to give due warning to the passen-

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makes an untrue statement, knowing it to be untrue, to another, who is induced to act upon it, an action lies. The facts bring the present case within that rule."]

[1] Waland *v.* Elkins, 1 Stark. R. 272; Weyland *v.* Elkins, (S. C.) Holt's N. P. R. 227.

[2] 5 Petersd. Abr. *Carriers*, p. 48, note.

[3] Penn. Railroad Co. *v.* Kilgore, 32 Penn. St. R. 292.

[4] Porter *v.* Steamboat New England, 17 Misso. R. 290.

[5] 1 Bell, Comm. p. 462, 5th edit.

[6] Stokes *v.* Saltonstall, 13 Peters, R. 181; 2 Kent, Comm. Lect. 40, p. 601, 602, 4th edit.; Hall *v.* Conn. River Steamboat Co. 13 Connect. R. 319; Farish *v.* Reigle, 11 Gratt. R. 708. See also, Kennard *v.* Burton, 25 Maine, R. 39.

[7] Aston *v.* Heaven, 2 Esp. R. 533; Stokes *v.* Saltonstall, 13 Peters, R. 181 191, 192.

gers.[1] So, if he takes the wrong side of the road, and an accident happens from want of proper room.[2] So, if by any incaution he comes in collision with another carriage.[3] So, if any accident happens from his racing against other coaches; or from his driving so rapidly over the common road, as amounts to rashness, or, *à fortiori*, from his driving immoderately over a dark and dangerous road; or from his taking too many passengers for the size and strength of his coach.[4] In short, he must in all cases exercise a sound and reasonable discretion in travelling on the road, to avoid dangers and difficulties; and if he omits it, his principals are liable.[5] The liability of the coach proprietors will be the same, although the injury to the passenger is caused by his own act, as by leaping from the coach, if there is real danger, and it arises from the want of due skill or from the careless conduct of the coachman.[6] And it will not make any difference in the case, that, by such attempt to escape, the passenger has increased the peril, or even occasioned the coach to upset, and has thereby caused the injury to himself, if the want of proper skill or care in the coachman has placed the passengers in a state of peril, and there was reasonable ground for supposing that the coach would thereby be upset.[7]

§ 599. There are in England three customary rules or directions

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[1] Dudley *v.* Smith, 1 Camp. R. 167; 1 Bell, Comm. p. 463, and notes, 5th edit.; Laing *v.* Colder, 8 Barr (Penn.), R. 479.

[2] Wordsworth *v.* Willan, 5 Esp. R. 273; Waland *v.* Elkins, 1 Stark. R. 272.

[3] Mayhew *v.* Boyce, 1 Stark. R. 423; Dudley *v.* Smith, 1 Camp. R. 167; 1 Bell, Comm. p. 462, and note, 5th edit.

[4] 1 Bell, Comm. p. 462, 463, and notes, 5th edit.; Israel *v.* Clark, 4 Esp. R. 259; Stokes *v.* Saltonstall, 13 Peters, R. 181.

[5] Jackson *v.* Tollett, 2 Stark. R. 37; Stokes *v.* Saltonstall, 13 Peters, R. 181, 192, 193; 2 Kent, Comm. Lect. 40, p. 601, 602, 4th edit.; 1 Bell, Comm. p. 462, and note, 5th edit.; Hall *v.* Conn. River Steamboat Co. 13 Conn. R. 319.

[6] Jones *v.* Boyce, 1 Stark. R. 493; Ingalls *v.* Bills, 9 Metc. R. 1; Eldridge *v.* Long Island Railroad Co. 1 Sandf. R. 89; Galena, &c. R. R. Co. *v.* Yarwood, 15 Illinois R. 471; McKinney *v.* Neil, 1 McLean, R. 540; Crofts *v.* Waterhouse, 3 Bing. R. 321; Stokes *v.* Saltonstall, 13 Peters, R. 181, 191.

[7] Stokes *v.* Saltonstall, 13 Peters, R. 181, 191, 192. And see Caldwell *v.* Murphy, 1 Duer, R. 233.

for driving; first, that, in meeting, each party shall bear or keep to the left. The rule in America is the reverse, that is to say, that each party shall bear or keep to the right.[1] Secondly, that in passing, the foremost person bearing to the left, the other shall pass on the off side. Thirdly, that in crossing the coachman shall bear to the left hand, and pass behind the other carriage.[2] But the rule in England is not inflexible, that the coachman shall in all cases pass another carriage on the off side. He may, if the street or road is very broad, go on the near side.[3] So, if there is no other carriage on the road, whose passage may be interrupted, the coachman is not bound to keep the left side of the road, according to the rule of the road. In such cases he may go on either side of the road, as he pleases.[4] These rules seem equally applicable to cases of persons on horseback, as well as to persons driving carriages.[5] However, if the coachman deviates from the limits of the road, and thereby the coach is upset, the proprietors of the coach will not be liable for any damage occasioned thereby, if in point of fact such deviation from his proper duty to keep the road was not owing to any want of skill, or diligence, or care on his part, but was imputable to an unavoidable mistake, or sudden alteration of the guiding objects on the road.[6] Such deviation will indeed ordinarily amount to a presumption of negligence or of a want of proper skill or knowledge; but it is a presumption capable of being repelled by evidence, and therefore proper for the consideration of a jury.[7]

§ 599 *a*. In respect to foot-passengers, it seems that they have a right to cross the highway; and therefore persons driving carriages along the same road are bound to exercise all possible diligence to avoid driving against them; and if

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[1] See Kennard *v.* Burton, 25 Maine R. 39.

[2] Petersd. Abr. *Carrier*, p. 55, note; and see Wayde *v.* Carr, 2 Dowl. & Ryl. R. 225.

[3] Petersd. &c.; Wordsworth *v.* Willan, 5 Esp. R. 273.

[4] Aston *v.* Heaven, 2 Esp. R. 533; Mayhew *v.* Boyce, 1 Stark. R. 423.

[5] Turley *v.* Thomas, 8 Carr. & P. R. 103.

[6] Crofts *v.* Waterhouse, 3 Bing. R. 321.

[7] Ibid.

they do not, and any accident happens to the foot-passenger, they will be responsible therefor.[1] Thus, if a person thus driving on the road cannot pull up, because his reins break, that will be no sufficient ground of defence for an injury done to a foot-passenger; because he is bound to have proper tackle.[2] It seems also, that the rule, as to the proper side of the road, does not apply in respect to foot-passengers; but, as to foot-passengers, carriages may drive on either side of the road in order to avoid them.[3]

§ 600. (3) The termination of the journey. In all cases the coach proprietors are bound to carry the passengers to the end of the journey, and to put them down at the usual place of stopping; and if that is an inn-yard, it is not sufficient to put them down on the outside of the gateway of the inn.[4] If they agree to take a passenger to a particular place, this also becomes obligatory on them.[5] If the custom of the coach is to carry the passengers to their own houses or lodgings in a particular place, that must be conformed to.

§ 601. Next, as to the liability of passenger-carriers. These naturally flow from their duties. As they are not, like common carriers of goods, insurers against all injuries, except by the act of God or by public enemies, the inquiry is naturally presented, what is the nature and extent of their responsibility.[6] It is certain, that their undertaking is not an undertaking absolutely to convey safely. But, although they do not warrant the safety of the passengers at all events, yet their undertaking and liability go to this extent, that they and their agents possess competent skill, and that they will use all due care and diligence in the performance of their duty.[7] But in what

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[1] Cotterill *v.* Starkey, 8 Carr. & Payne, R. 691.

[2] Ibid.

[3] Ibid.

[4] Dudley *v.* Smith, 1 Camp. R. 167.

[5] Ker *v.* Mountain, 1 Esp. R. 27.

[6] Stokes *v.* Saltonstall, 13 Peters, R. 181, 191; Sharp *v.* Grey, 9 Bing. R. 457.

[7] Harris *v.* Costar, 1 Carr. & P. R. 636; Crofts *v.* Waterhouse, 3 Bing. R. 321; Stokes *v.* Saltonstall, 13 Peters, R. 181, 191; Ross *v.* Hill, 2 Mann., G.

manner are we to measure this due care and diligence? Is it ordinary care and diligence, which will make them liable only for ordinary neglect? Or is it extraordinary care and diligence, which will render them liable for slight neglect? As they undertake for the carriage of human beings, whose lives, and limbs, and health, are of great importance, as well to the public as to themselves, the ordinary principle in criminal cases, where persons are made liable for personal wrongs and injuries arising from slight neglect, would seem to furnish the true analogy and rule. It has been accordingly held, that passenger-carriers bind themselves to carry safely those whom they take into their coaches, as far as human care and foresight will go, that is, for the utmost care and diligence of very cautious persons; and of course they are responsible for any, even the slightest neglect.[1] [And passenger-carriers by railroad are bound to the most exact care and diligence, not only in the management of their trains and cars, but also in the structure and care of their track, and in all the subsidiary arrangements necessary to the safety of the passengers.[2] And when carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. The personal safety of the passengers should not be left to the sport of

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& Scott, R. 877. See Galena, &c. R. R. Co. *v.* Yarwood, 15 Illinois R. 471; Hall *v.* Conn. River Steamboat Co. 13 Conn. R. 319; Fuller *v.* Naugatuck R. R. Co. 21 Conn. R. 558.

[1] Aston *v.* Heaven, 2 Esp. R. 533; Christie *v.* Griggs, 2 Camp. R. 79; White *v.* Boulton, Peake, R. 81; 1 Bell, Comm. p. 562, 5th edit.; Stokes *v.* Saltonstall, 13 Peters, R. 181, 191, 192, 193. This whole subject was thoroughly examined by the Supreme Court of the United States, in the case of Stokes *v.* Saltonstall; and the opinion of the Court, delivered by Mr. Justice Barbour, will be found to embrace and to exhaust the learning applicable to it. See also, Camden and Amboy, &c. Railroad Co. *v.* Burke, 13 Wend. R. 611, 627, 628. See Peters *v.* Rylands, 8 Harris (Penn.), R. 502; Farish *v.* Reigle, 11 Gratt. R. 709.

[2] McElroy *v.* Nashua & Lowell Railroad Corporation, 4 Cush. R. 400; where the injury arose from the careless management of a switch connecting the defendants' road with another road, the switch being provided and managed by the other road.

chance, or the negligence of careless agents. Any negligence in such cases, may well deserve the epithet of "gross."[1]]

§ 601 *a*. Where any damage or injury happens to the passengers by the breaking down or overturning of the coach, or by any other accident occurring on the road, the presumption *primâ facie* is, that it occurred by the negligence of the coachman; and the *onus probandi* is on the proprietors of the coach, to establish that there has been no negligence whatsoever; and that the damage or injury has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent.[2] For the law will (as we have seen), in tenderness to human life and human limbs, hold the proprietors liable for the slightest negligence, and will compel them to repel, by satisfactory proofs, every imputation thereof.[3] [But perhaps no more is meant by the foregoing paragraph than that the presumption of a want of proper care may arise from the circumstances attending the injury; a presumption sufficient to warrant a jury in finding negligence unless the carrier shows that the injury was from no fault of his; for the mere fact that a person is injured while riding in a railroad car, does not impose upon the company the burden of disproving negligence.[4] And wherever negligence of the defendent is the gist of the plaintiff's action, the burden of proving that negligence is always on the plaintiff.[5]]

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[1] Philadelphia & Reading Railroad Co. *v.* Derby, 14 How. U. S. R. 486; reaffirmed in Steamboat New World *v.* King, 16 How. U. S. R. 474.

[2] Christie *v.* Griggs, 2 Camp. R. 79; Stokes *v.* Saltonstall, 13 Peters, R. 181, 192, 193; 1 Bell, Comm. p. 462, 463, 5th edit.; Sharp *v.* Grey, 9 Bing. R. 457; Ware *v.* Gay, 11 Pick. R. 106, 112; Carpue *v.* London and Brighton Railway Co. 5 Adolph. & Ellis, N. S. R. 747; Skinner *v.* London, &c. Railway Co. 2 Eng. Law & Eq. R. 360; S. C. 5 Exch. R. 787; Laing *v.* Colder, 8 Barr. (Penn.), R. 479; Bowen *v.* New York Central Railroad, 18 N. Y. R. 410; Sullivan *v.* Philadelphia Railroad Co. 6 Casey, 234; Fairchild *v.* California Stage Co. 13 Calif. R. 604.

[3] Ibid.; Ante, § 601; Farish *v.* Reigle, 11 Gratt. R. 709; Stockton *v.* Frey, 4 Gill, R. 407; Hegeman *v.* Western Railroad Co. 16 Barb. R. 353, and 3 Kernan, 24.

[4] Holbrook *v.* The Utica & Schenectady R. R. Co. 2 Kernan, R. 336.

[5] Tourtellot *v.* Rosebrook, 11 Metc. R. 460. And see Bird *v.* Great Northern Railway, 4 Hurl. & Norm. 842. (Am. Ed.). The case is not in the English edition.

§ 602. But passenger-carriers, not being insurers, are not responsible for accidents, where all reasonable skill and diligence have been employed. When every thing has been done which human prudence, care, and foresight can suggest, accidents may happen. The lights may in a dark night be obscured by fog; the horses may be frightened; the coachman may be deceived by the sudden alteration of objects on the road; the coach may be upset accidentally by striking another vehicle, or by meeting with an unexpected obstruction; or from the intense severity of the cold, the coachman, although possessed of all proper skill, and taking all due and reasonable care, may at the time become physically incapable of managing his horses, or of otherwise doing his duty;[1] in all these, and the like cases, if there is no negligence whatsoever, the coach proprietors are exonerated.[2]

§ 603. Next, as to the rights of passenger-carriers. As they are under an obligation to carry passengers, and cannot properly refuse them, when they have suitable accommodations, so, on the other hand, they are entitled to be secure of their reward or compensation. They have, therefore, a right to demand and to receive their fare at the time when the passenger engages his seat; and if he refuses to pay it, they may fill up the place with other passengers, who are ready to make the proper deposit.[3]

§ 604. The passenger-carrier also has a lien upon the luggage or baggage of the passenger for his fare or passage-money; but not a lien on the person of the passenger, or the clothes he has on.[4] Their duties as carriers, so far as respects the baggage of the passengers, do not terminate at the moment of the termination of their journey, or, in case of steamboats or railway-cars, at the arrival at the common depot. But they are bound for the safe delivery of their luggage to the pas-

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[1] Stokes *v.* Salstonstall, 13 Peters, R. 181, 191, 192, 193.

[2] Crofts *v.* Waterhouse, 3 Bing. R. 319, 321; Christie *v.* Griggs, 2 Camp. R. 79; Aston *v.* Heaven, 2 Esp. R. 533.

[3] Ker *v.* Mountain, 1 Esp. R. 27.

[4] Abbott on Shipp. P. 3, ch. 3, § 11, 5th edit.; Wolf *v.* Summers, 2 Camp. R. 631.

sengers.[1] However, their liability as common carriers will determine, as to the luggage, if it be not demanded within a reasonable time, and become that of mere ordinary bailees for hire.[2]

§ 605. Secondly. The rights, duties, and liabilities of PASSENGER-CARRIERS BY WATER. In the preceding remarks, our attention has been principally drawn to the conduct of passenger-carriers on land. But there are some rules of an analogous nature, which have been adopted for the regulation and government of PASSENGER AND CARRIER-VESSELS in inland navigation, as well as upon the ocean, which deserve notice, as they may furnish grounds of responsibility or excuses for losses, which have arisen in the course of their voyages, from the accidents or collisions or rivalries of navigation.

§ 606. Thus, in New York, various positive regulations have been adopted by the legislature in regard to the conduct of canal-boats; and if the master of any boat deviates from them, and any injury occurs, he and the owners will not only be liable to the statute penalties, but they will also be bound to make good all losses and injuries sustained thereby.[3] It seems to be a general regulation, that freight-boats shall afford every facility to the passage of packet or passenger-boats, as well through the locks as everywhere else on the canal. Therefore, if a packet-boat arrives at a lock, while a freight-boat is waiting for it to be emptied, the freight-boat is bound to yield the first passage into the lock to the packet-boat. And if, by any undue resistance on the part of the freight-boat, an injury occurs, it must be borne by the master and owners of the latter.[4]

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[1] See Richards *v.* London, Brighton, &c. Railway Co. 7 Man., Gr. & Sc. R. 839; Butcher *v.* London & South-western Railway Co. 29 Eng. Law & Eq. R. 347; 16 C. B. 13; Midland Railway Co. *v.* Bromley, 17 C. B. 372.

[2] Powell *v.* Myers, 26 Wend. R. 591; Camden and Amboy Railroad and Transp. Co. *v.* Belknap, 21 Wend. R. 354.

[3] See Act of New York of 13th of April, 1820, ch. 202, cited in Farnsworth *v.* Groot, 6 Cowen, R. 699.

[4] Farnsworth *v.* Groot, 6 Cowen, R. 698.

§ 607. The conduct of carrier-vessels on the ocean has in several instances come under the examination of judicial tribunals; and a law of the sea, as well as a law of the road, has been recognized, as to their rights and duties. The Court of Admiralty has a general jurisdiction in what are technically called cases of collision, that is, cases where damages have been occasioned by the running foul or collision of two vessels on the high seas.[1] And as the Court of Admiralty is the only tribunal sitting in countries under the jurisprudence of the common law, which can ordinarily administer a remedy *in rem*, and hold the offending vessel itself liable for the payment of the damages, questions of this nature have been of more frequent occurrence in that Court than elsewhere.[2] The jurisdiction, also, is equally applicable in a proceeding *in rem*, whether the offending vessel be a domestic vessel or a foreign vessel, or whether both be foreign vessels or both be domestic vessels.[3]

§ 608. According to Lord Stowell, there are four possibilities, under which an accident of this sort may occur.[4] In the first place, it may happen without blame being imputed to either party, as where the loss is occasioned by a storm, or by any other irresistible force, constituting a case of the *vis major*. In such a case, the loss must be borne by the party on whom it happens to light; the other not being responsible to him in any degree.[5] This (as we shall see) was also the

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[1] The Thames, 5 Rob. Adm. R. 348; The Neptune, &c. 1 Dodson, R. 467; The Woodrop Sims, 2 Dodson, R. 83; The Dundee, 1 Hagg. Adm. R. 109; Gale *v.* Laurie, 5 Barn. & Cress. R. 156; The Public Opinion, 2 Hagg. Adm. R. 398.

[2] Ibid.

[3] The Johann Friedrich, 1 W. Rob. Adm. R. 35; s. c. 6 Monthly (English) Law Magazine, part 2d, p. 89.

[4] The Woodrop Sims, 2 Dod. R. 83, 85. Emerigon puts three cases only; (1) where collision happens by accident or inevitable casualty; (2) where it happens by the fault of one party; (3) where it happens by some fault, but is impossible to ascertain which is the party to blame. 1 Emerig. Assur. ch. 12, § 14, p. 411.

[5] The Woodrop Sims, 2 Dod. R. 83, 85; The Catharine of Dover, 2 Hagg. Adm. R. 145; Stainback *v.* Rae, 14 How. U. S. R. 532; 1 Bell, Comm. p. 580, 5th edit.; Abbott on Shipp. P. 3, ch. 8, § 12, p. 354, 5th edit.; 3 Kent, Comm.

Roman law.[1] But among modern maritime nations there is a great diversity of principle and practice; some of them adhering to the Roman and English doctrine, and others apportioning the loss between the parties.

§ 608 *a*. Secondly, a misfortune of this kind may arise, where both parties are to blame, and where there has been a want of due diligence or skill on both sides. In such a case the rule of the maritime law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them.[2] This also seems to be the general rule adopted by modern maritime nations; and it has been inflexibly supported by the High Court of Admiralty of England.[3] Emerigon has laid down the same rule, and has cited authorities from different nations to support it.[4] The modern Code of France (following in this respect the interpretation given to the Ordinance of Louis XIV.) has adopted an equitable apportionment, declaring that the loss shall be divided in equal portions between the vessels.[5] The law of Scotland has fully recognized the same rule; and it has been directly applied by the House of Lords in a case brought there by appeal from the Courts of Scotland.[6] It has sometimes been said, that this is

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Lect. 47, p. 230, 231, 4th edit.; The Shannon and The Placidia, Jurist (English), 1843, p. 380, 381; s. c. 1 W. Rob. Adm. R. 463.

[1] Post, § 610.

[2] Post, § 610, and note.

[3] The Woodrop Sims, 2 Dod. R. 83, 85; 3 Kent, Comm. Lect. 47, p. 231, 4th edit.

[4] 1 Emerigon, Assur. ch. 12, § 14, p. 417, 418; 2 Valin. Lib. 3, tit. 7, art. 11, p. 183.

[5] Code de Commerce, art. 407; 2 Valin, Com. 3, B. 3, tit. 7, art. 11, p. 183.

[6] Le Neve *v.* The Edinburgh and London Shipping Company, decided in the House of Lords, on the 15th of June, 1824. The decree there was, — "The Lords find, that both ships in this case were in fault; and that the whole damage sustained by the owners of the ship Wells, and of the cargo which were sunk and lost, should be borne equally by the parties; and find, therefore, that the appellants are liable to the respondents in the sum of £1,535 16*s*., one half of the value of The Wells and cargo, such half not exceeding the value of The Speightley and her freight." Cited 1 Bell, Comm. p. 581, 5th edit.; 3 Kent, Comm. Lect. 47, p. 231, 232, 4th edit. In Kent *v.* Elstob, 3 East, R. 18, the Court of King's Bench held, that in a case of collision, where both parties were

a sort of *rusticum judicium*; but it seems certainly founded in the general principles of justice and equity.[1]

§ 608 *b*. Thirdly. It may happen by the misconduct of the suffering party only; and then the rule is, that the sufferer must bear his own burden.[2] The rule is so consonant to common justice, that it seems to be adopted as a general maxim of maritime jurisprudence in modern times.[3]

§ 608 *c*. Lastly, it may have been the fault of the ship which ran down the other; and in this case the injured party will be entitled to an entire compensation from the other.[4] [And a lien is thereby created on the ship in fault, and follows the ship into whosoever hands it comes.[5]] The Ordinance of

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to blame, there could be no recovery of damages in any court of common law, or apportionment of damages between the parties. The same doctrine was held by Lord Tenterden in Vanderplank *v.* Miller, 1 Mood. & Malk. R. 170. The same doctrine was recognized in Lack *v.* Seward, 4 Carr. & Payne, R. 106; in Vennall *v.* Garner, 1 Cromp. & Mees. R. 21; and in Luxford *v.* Large, 5 Carr. & Payne, R. 421. See also, Woolf *v.* Beard, 8 Carr. & Payne, R. 373. The Court of Admiralty notwithstanding, continues to act upon its rule as the sound doctrine of the maritime law. See De Vaux *v.* Salvador, 4 Adolph. & Ellis, R. 420; The Monarch, 1 W. Rob. Adm. R. 21; The Oratava, May, 1839, 5 Monthly (English) Law Magazine, vol. 5, p. 45; The Earl Bathurst, Nov. 1838, Dr. Lushington, Monthly (English) Law Magazine for December, 1838, vol. 3, p. 446, 447; The De Cock, July, 1839, Monthly Law Magazine, vol. 5, part 2d, p. 303. The rule of the Admiralty has been fully recognized by Judge Hopkinson, in Reeves *v.* The Ship Constitution, Gilpin, R. 579. See also, The Richmond, January, 1838, Monthly (English) Law Magazine, vol. 3, p. 259.

[1] See 3 Kent, Comm. Lect. 47, p. 231, 4th edit.; Cleirac, Us et Cout. de la Mer, Jugemens d'Oleron, art. 14, Comment. § 5, p. 34, edit. 1788. The editions of Cleirac vary in the paging. See 1 Bell, Comm. p. 581, 5th edit.

[2] The Woodrop Sims, 2 Dod. R. 83, 85; The Catharine of Dover, 2 Hagg. Adm. R. 145; The Ligo, 2 Hagg. Adm. R. 356; Dig. Lib. 9, tit. 2, l. 29, § 2; Pothier, Pand. Lib. 9, tit. 2, n. 16.

[3] 2 Valin, Comm. Liv. 3, tit. 3, art. 11, p. 183; Jacobsen, Sea Laws, B. 4, ch. 1, p. 325, 328, Frick's ed.; 1 Emerigon, Assur. ch. 12, § 14, p. 413.

[4] I quote the very language of Lord Stowell, in the Woodrop Sims, 2 Dodson, R. 83, 85. See also, 1 Bell, Comm. p. 579, 580, 581, 5th edit.

[5] [The Bold Buccleugh (same case, Harmer *v.* Bell), 7 Moore, Priv. Council Cases, 267; s. c. 22 Eng. Law and Eq. R. 62. In this case the Court said: "But it is further said, that the damage confers no lien upon the ship, and a *dictum* of Dr. Lushington, in the case of the Volant, 1 W. Rob. 387, is cited as an authority for this proposition. By reference to a contemporaneous report

Louis XIV. lays down the rule in terms equally applicable to the present and to the precedent case, that whenever the collision is by the fault of one of the masters of the vessels, the damage shall be borne by him who has caused it.[1]

§ 608 *d*. In cases of collision, where a loss is caused by the fault of one of the ships only, the general maritime law exacts a full compensation, to be paid out of all the property of the owners of the guilty ship, upon the common principle applied to persons who undertake the conveyance of goods, that they are answerable for the conduct of the agents whom they employ; and the other parties, who suffer the damage, place no trust in these agents, and can exercise no sort of control over their acts. To this rule England for a long time conformed. But Holland having, for the protection of its own navigation, limited the remedy against the owner to the value of the ship, freight, apparel, and furniture, England has recently followed the example, and established by statute a like limitation.[2] In America no positive enactment has been made; and therefore the responsibility of the guilty ship and its owners stands upon the general maritime law.

§ 609. Another case has been put by a learned commentator upon commercial law.[3] It is, where there has been some fault or neglect; but on which side the blame lies is inscrutable, or is left by the evidence in a state of uncertainty. In such a case, many of the maritime states of Continental Europe have adopted the rule to apportion the loss between the two vessels.[4] In the Scottish law this point seems left undetermined;

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of the same case (1 Notes of Cases, 608), it seems doubtful whether the learned Judge did use the expression attributed to him by Dr. W. Robinson. If he did, the expression is certainly inaccurate, and being a *dictum* merely, not necessary for the decision of that case, cannot be taken as a binding authority. A maritime lien does not include or require possession."]

[1] 1 Valin, Comm. Liv. 3, tit. 7, art. 11, p. 193. See also, Jacobsen's Sea Laws, B. 4, ch. 1, p. 324 to 342, Frick's edit.

[2] See Stat. 53 Geo. 3, ch. 159; The Dundee, 1 Hagg. Adm. R. 109; Gale *v.* Laurie, 5 Barn. & Cress. R. 156; The Catharine of Dover, 2 Hagg. Adm. R. 145.

[3] Mr. Bell, in 1 Bell, Comm. p. 579, 5th edit.

[4] 1 Bell, Comm. p. 579 to 582, 5th edit., and the authorities there cited.

although one of her early jurists has considered the rule to be the same as the rule of apportionment on the Continent.[1] The English law, at the time when Mr. Bell published the last edition of his Commentaries, had not furnished any authority either for or against the rule.[2] If the question be still open to controversy, there is great cogency in the reasoning of Mr. Bell in favor of adopting the rule of apportioning the loss between the parties.[3] Many learned jurists have supported the

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[1] 1 Bell, Comm. p. 579 to 582, 5th edit., and the authorities there cited.

[2] Ibid. (edit. 1826). In a recent case of collision, however, Sir Christopher Robinson, in summing up the facts to the masters of Trinity House, whom he had called to his assistance, made the following remarks: "The result of the evidence will be one of three alternatives; either a conviction on your mind that the loss was occasioned by accident, in which case it must be sustained by the party on whom it has fallen; or a state of reasonable doubt as to the preponderance of evidence, which will have nearly the same effect; or third, a conviction that the party charged with being the cause of the accident is justly chargeable with the loss of this vessel, according to the rules of navigation, which ought to have governed them." The Catharine of Dover, 2 Hagg. R. 145, 154. It is not perhaps quite certain whether the learned Judge had in his mind at the moment a case where there was a collision by some fault, but it was uncertain which party was in fault, when he speaks of "a state of reasonable doubt as to the preponderance of evidence," or whether he applied that language to a doubt whether it was a loss by accident or not; although the latter would seem to be the natural construction of the language in the actual connection in which it stands with reference to the points before the Court, which were, whether the loss was by the wilful malice or by the gross negligence of the master of the vessel against which the suit in rem was brought. The Catharine of Dover, 2 Hagg. R. 147. If his language was meant to apply to a case of inscrutable fault or blame, then it would seem to affirm the rule in England to be, not to apportion the loss in a case of damage by inscrutable fault or blame. If it was meant to apply merely to the question of accident, then the rule would seem still to be open to controversy in England.

[3] 1 Bell, Comm. p. 581, 5th edit. As Mr. Bell's work is rare in this country, I take the liberty of adding here the whole passage, although it is long. "It is in the case which lies between these two extremes that the main difficulty is found, for the resolution of which rules so different have been resorted to. This is the case where both parties are to blame, or where there is some neglect or fault which is inscrutable. By the maritime law, this is a case of average loss or contribution, in which both ships are to be taken into the reckoning, so as to divide the loss. And although it may be said (according to Cleirac), that this rule of division is a rustic sort of determination, and such as arbiters and amicable compromisers of disputes commonly follow, where they cannot discover the

justice and equity of such a rule; and it especially has the strong aid of Pothier, and Valin, and Emerigon.[1]

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motives of parties, or where they see faults on both sides; this impeaches neither the justice nor the expediency of the rule. The rule of the Roman law appears to be against the determination of the maritime codes. But in the immature jurisprudence of Rome, relative to maritime commerce, the more difficult case, which was forced on the attention of subsequent navigators, does not appear to have occurred. In distinguishing more scrupulously the cases to which the doctrine is applicable, one case is where there is fault on both sides; the other, where there is fault which cannot be fixed on either. As to the former, Lord Stowell, the greatest authority on a question of this nature, and under whose peculiar cognizance such questions fall in England, views the doctrine consistently with the rule of the maritime codes. 'A misfortune of this kind,' he says, 'may arise where both parties are to blame; where there has been a want of diligence or of skill on both sides; in such a case, the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them.' In the other case, of inscrutable fault, there seems not to have been any example in England requiring decision; while the only authority on the point in the books of Scottish law, is to be found in the book which goes under the name of President Balfour, where, as one of the Sea Laws, the rule of equity, as adopted in the maritime code, is laid down as the law of Scotland. It seems, therefore, to be a point still open to consideration, both in England and here. In legal arrangement, it belongs to the doctrine of average or contribution; and the point is, whether it be not consistent with equity and expediency, that the contribution of average of such a misfortune, in the case of inscrutable fault, as well as in the case of obvious fault on both sides, shall comprehend both ships, to equalize the loss, as if all were embarked on the same bottom. In point of equity, much, undoubtedly, may be said on both sides; in point of expediency, there appears to be no sufficient protection, without some such rule, for weak and small vessels against stronger and larger ships; the masters and crews of which will undoubtedly be more careless, when they know that there is little risk of detection, and none at all of direct damage to their vessel, by which a smaller ship may be run down without injury to the assailant. But, under the rule alluded to, the fear of loss will operate as strongly on the masters of large ships as of small, since the damage is to fall proportionally on both; and if thus equal vigilance and tenderness can be secured on the part of large ships against small, as if they were themselves in danger of direct injury, this rule of maritime law is recommended by very strong reasons of expediency. It is very true, that the laws already quoted from the Consolato del Mare may be construed as not entirely consistent with that rule. But while the cases

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[1] Pothier, Avaries, n. 155; 1 Emerig. Assur. ch. 12, § 14; 2 Valin, Lib. 3, tit. 7, art. 11, p. 183.

§ 610. The Roman law, in cases where the collision arose from the fault or neglect of one party only, made that party

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there stated are, at least, such as arise out of physical accident, all the Northern codes of maritime law accord with the doctrine. The laws of Oleron and those of Wisbuy, the Code of the Hanse Towns, the Ordonnance de la Marine of Louis XIV., and, last of all, the Code de Commerce, all divide the damage according to the same rule, which is laid down by Balfour in his Sea Laws, as already quoted. And the principle of the rule is approved of by the most eminent commentators and jurists of the Continent. Taking this, then, in these circumstances, as a question not yet settled by any judicial determination, and respecting which any decision to be given would probably be ruled by the maritime law, as grounded on strong reasons of expediency, and established by all the authorities quoted, the question of contribution would on that footing include two points: 1. Whether the ships are to contribute equally, or proportionally to their value. The laws of Wisbuy made a ratable contribution. The laws of Oleron made it a contribution in equal shares. So did the Hanseatic Code. And the chief authorities seem to favor this rule. Valin, in arguing this matter, after quoting the various authorities, states not only the law, but the principle, to be in favor of an equal division of the loss, without regard to the value of the ships; as not only shorter and plainer, but as better fitted to operate on the minds of shipmasters, who might otherwise be careless of their course. It will be observed, that the responsibility of ship-owners is limited to the value of the ship and freight by the laws already taken notice of; both by the general statute relative to liability for losses arising by perils of the sea, and also by the Pilotage Acts. It will also be observed, however, that the Pilotage Acts do not extend to Scotland. 2. The next question would be, whether the cargo of the ship is to suffer contribution, as well as the ships themselves. It ought always to be recollected in this question, that the owners of the cargo cannot possibly be in fault; and that the reason of expediency, on which mainly the rule of the maritime code rests, cannot, therefore, apply to them; while no case of proper average can arise, where there is not a voluntary sacrifice for the common safety. It is a different question, whether a cargo damaged in the collision should be deprived of the benefit of the contribution to be made by the other ship; for this is part of the damage which has been occasioned by the misfortune; and if it were to be considered merely as a peril of the sea, as between the merchant and his own ship-owners, he, who may, perhaps, have suffered the most, would unjustly be left without a remedy. According to some authorities, the cargo ought, in such a case, to have the benefit of the contribution. Valin dissents, and lays it down as law, that the contribution is only between the ships, to the total exclusion of the cargoes from the benefit, as well as from the burden. The former rule, however, seems to have been adopted by the House of Lords, in a case already referred to. In cases of damage by collison, it is no defence to the owners, that the ship in fault is under the direction of a pilot, and that the remedy lies against

responsible for the whole loss. But in cases of a loss by pure accident, or by the act of God, the same rule existed as in the common law, that the loss must be borne by the sufferer, according to the maxim, that it falls where it lights.[1] *Si navis tua, impacta in meam scapham, damnum mihi dedit, quæsitum est, quæ actio mihi competeret. Et ait Proculus, si in potestate nautarum fuit, ne it acciderit, et culpâ eorum factum sit, Lege Aquiliâ cum nautis agendum. Quia parvi refert, navem immittendo, aut servaculum ad navem ducendo, an tuâ manu damnum dederis; quia omnibus his modis per te damno adficior. Sed si fune rupto, aut cum a nullo regeretur, navis incurrisset, cum domino agendum non esse.*[2] *Si navis alteram contra se venientem obruisset, aut in gubernatorem, aut in ducatorem, actionem competere damni injuriæ, Alfenus ait. Sed si tanta vis navi facta sit, quæ temperari non potuit, nullam in dominum dandam actionem; sin autem, culpâ nautarum id factum sit, puto Aquiliæ sufficere.*[3] Mr. Bell, in his text says, that this is the rule of all the codes maritime and municipal. And he inclines to the opinion, that the rule of apportionment, which is found in some of these codes, applies only to cases of mutual fault, or of inscrutable fault.[4] That the rule of the Roman law has been adopted into the maritime codes of many nations, cannot admit of any doubt.[5] That it has been

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him. They are liable in the first place, and must seek their remedy against the pilot."

[1] Dig. Lib. 9, tit. 2, l. 29, § 2, 4; 1 Bell, Comm. p. 580, 5th edit.; Ante, § 608.

[2] Dig. Lib. 9, tit. 2, l. 29, § 2; Pothier, Pand. Lib. 9, tit. 2, n. 16.

[3] Dig. Lib. 9, tit. 2, l. 29, § 4; Pothier, Pand. Lib. 9, tit. 2, n. 21.

[4] 1 Bell, Comm. p. 580, 581, and notes, 5th edit.

[5] See 1 Bell, Comm. p. 580, 581, 582, and notes, 5th edit. Mr. Bell cites, as in favor of the rule, the Consolato del Mare, edit. Casaregis, cap. 197 to 200; Id. edit. Boucher, cap. 200 to 203; Jus Marit. Hanseat. tit. 10, art. 2, Kuricke, edit. Heineccii, p. 803. Emerigon also cites other authorities to the same effect. 1 Emerig. Assur. ch. 12, § 14, p. 411 to 414. On the other hand the laws of Oleron (art. 14), and of Wisbuy (art. 26, 50, 67, 70), apportion the loss in such case between the parties. 1 Bell, Comm. p. 580, note (5), 5th edit. The Ordinance of Louis XIV. adopts the same rule of apportionment; 2 Valin, Comm. Liv. 3, tit. 7, § 10, p. 177; as does the law of Holland, of Denmark, and of Prussia. Jacobsen's Sea Laws, B. 4, ch. 1, § 330, 331, Frick's edit.; Bynk. Quest. Jur. Priv. Lib. 4, ch. 18, 19, 20; Abbott on Shipp. P. 3, ch. 8, § 12, and

adopted into all, or that it now pervades all, is by no means clear. Mr. Abbott entertains a different opinion on this point from Mr. Bell, and says, that, by the law of most of the Continental nations of Europe, the injury done by one vessel to another, or to its cargo, without fault in the persons belonging to either ship, is to be equally borne by the owners of the two vessels;[1] and Mr. Marshall expresses the same opinion.[2] Mr. Bell, however, has the support of many learned jurists on his side.[3]

§ 611. In all these cases of collision the essential question is, whether proper measures of precaution are taken by the vessel which has unfortunately run down the other. This is partly a question of nautical usage, and partly a question of nautical skill. If all the usual and customary precautions are taken, then it is treated as an accident, and the vessel is exonerated. If otherwise, then the offending vessel and its owners are deemed responsible.[4] Some rules, however, which proba-

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note. The present Commercial Code of France has altered the old rule, and adopted that of an apportionment of the loss. Code de Commerce, art. 407. See also, Jacobsen's Sea Laws, p. 325 to 342, Frick's edit. See also, Cleirac, Jugemens d'Oleron, art. 14, and Comm. p. 68, old edit.; Id. p. 33, 34, of edit. 1788. See also, Peters *v.* Warren Insurance Co. 3 Sumn. R. 389; s. c. 1 Story, R. 463; s. c. in Supr. C. of U. S. 14 Pet. R. 99. See also, General Mutual Ins. Co. *v.* Sherwood, 14 How. (U. S.) R. 351.

[1] Abbott on Shipp. P. 3, ch. 8, § 12, 5th edit.; Peters *v.* Warren Insurance Co. 3 Sumn. R. 389. See the preceding note.

[2] Marshall on Insur. B. 1, ch. 12, § 2, 2d edit.

[3] 1 Bell, Comm. p. 580, 581, and notes, ibid., 5th edit.; Pothier, Avaries, n. 155; 1 Emerig. Assur. ch. 12, § 14; 3 Kent, Comm. Lect. 47, p. 230, 231, 4th edit.

[4] Lowry *v.* The Steamboat Portland, 1 Law Reporter, 318. In this case the learned District Judge (Davis) took the opinion in writing of some distinguished nautical men under oath, who among other things returned this answer: "In our answers to former questions, we have stated the rule or usage to be, that when two vessels are approaching each other, both having the wind free, and consequently the power of readily controlling their movements, the vessel on the larboard tack shall give way, and thus each pass to the right. This rule should govern vessels, too, sailing on the wind, and approaching each other, when it is doubtful which is to windward. But if the vessel on the larboard tack is so far to windward, that, if both persist in their course, the other will strike her on the leeward side abaft the beam, or near the stem, in such case

bly had their origin in the customs of navigation, are now adopted as positive rules of law. Thus, the law imposes upon the vessel having the wind free the obligation of taking proper measures to get out of the way of a vessel which is close hauled, and of showing that it has done so; otherwise the owners will be responsible for any loss which ensues.[1] Therefore, a vessel sailing with the wind must give way to one sailing by the wind; and the vessel sailing by the wind is not obliged to alter her course.[2] Another rule is, that, when vessels are crossing each other in opposite directions, and there is the least doubt of their going clear, the vessel on the starboard tack is to persevere in her course, while that on the larboard tack is to bear up, or keep more away before the wind.[3] Another rule is, that the master of a vessel entering a port or river, where other vessels are lying at anchor, is bound to make use of all proper checks to stop the headway of his vessel, in order to prevent accidents; and if, from want of such precautions, a loss ensues, he and his owners will be responsible.[4] So, a

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the vessel on the starboard tack must give way, as she can do so with greater facility, and less loss of time and distance, than the other. These rules are particularly intended to govern vessels approaching each other, under circumstances that prevent their course and movements being readily ascertained with accuracy; for instance, in a dark night, or dense fog. At other times, circumstances may render it expedient and proper to depart from them; for we consider them all subordinate to the rule prescribed by common sense, and applicable to all cases, under any circumstances, which is, that every vessel shall keep clear of every other vessel when she has the power to do so, notwithstanding such other may have taken a course not conformable to established usage. We can scarcely imagine a case, in which it would be justifiable to persist in a course, after it had become evident that collision would ensue, if by changing such course the collision could be avoided."

[1] The Woodrop Sims, 2 Dodson, R. 83; 3 Kent, Comm. Lect. 47, p. 230, 231, 4th edit.; The Thames, 5 Rob. Adm. R. 345; 1 Bell, Comm. p. 580, 5th edit.

[2] The Juno and The Alert, Angell's Law Intelligencer, vol. 1 (1829), p. 20; Handaysyde *v.* Wilson, 3 Carr. & Payne, R. 528; Jameson *v.* Drinkald, 12 Moore, R. 148; The De Cock, July, 1839, Monthly (English) Law Magazine, vol. 5, p. 303.

[3] The Shannon, 2 Hagg. Adm. R. 174.

[4] The Neptune 2d, 1 Dodson, R. 467; 3 Kent, Comm. Lect. 47, p. 230, 231, 4th edit. See The Shannon and The Placidia, 1 W. Rob. Adm. R. 463; s. c.

light vessel with a free wind, meeting a laden vessel close hauled, is bound to give way, and the latter is to keep her course.[1]

§ 611 *a*. Rules founded on the like usages and the general convenience of commerce have been recognized in the American Courts. Thus, it has been certified (as we have just seen),[2] that when two vessels are approaching each other, both having the wind free, and consequently the power of readily controlling their movements, the vessel on the larboard is bound to give way, and thus to pass to the right. The same rule governs vessels sailing on the wind, and approaching each other, when it is doubtful which is to windward. But if the vessel on the larboard tack is so far to windward, that, if both persist in their course, the other will strike her on the lee side abaft the beam or near the stem, in such a case, the vessel on the starboard tack must give way, as she can do so with greater facility and less loss of time and distance than the other.[3]

§ 611 *b*. In respect to steamboats, as they do not receive their impetus from sails, but from steam, they are capable of being kept under better command; and therefore it seems, from their greater power, they ought always to give way in favor of vessels using sails only.[4] Indeed, a steamer is generally deemed as always sailing with a free and fair wind, and therefore is bound to do whatever a common vessel, going free or with a fair wind, would, under similar circumstances, be required to do in relation to any other vessels which it meets in the course of its navigation.[5] So, where two steamers are sail-

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Jurist (English), 1843, p. 380. And as to steamships, see The Rose, Jurist, (English), 1843, p. 381; s. c. 2 W. Rob. Adm. R. 1; The Iron Duke, 2 W. Rob. Adm. R. 385.

[1] The Harriett, 1 W. Rob. Adm. R. 182.

[2] Ante, § 611, note.

[3] Lowry *v.* The Steamboat Portland, 1 Law Reporter, 313; and see note to § 610; Handaysyde *v.* Wilson, 3 Carr. & Payne, R. 528; The Oratava, May, 1839, 5 Monthly (English) Law Magazine, part 2d, p. 45.

[4] Ibid.; Hawkins *v.* Duchess and Orange Steamboat Co. 2 Wend. R. 452; The Gazelle, The (English) Jurist, June 3, 1843, p. 497; s. c. 1 W. Rob. Adm. R. 471.

[5] Lowry *v.* The Steamboat Portland, 1 Law Reporter, 313, and § 310, *supra;* Hawkins *v.* Duchess and Orange Steamboat Co. 2 Wend. R. 452.

ing in opposite directions, and it is clear that, if they continue their course, there is a reasonable probability of their coming in collision, it is held in England to be the true rule that each shall put its helm a-port so as always to pass on the larboard side of each other; and the steamer which does not will, in case of damage by collision, be responsible.[1]

There are some other rules laid down by Emerigon and other foreign Jurists; but as they do not appear to be expressly recognized in the common law, it may be questionable how far they constitute a part of the general law of the sea.[2] It seems, that it will make no difference in the liability of the owner for the collision, that the vessel had a licensed pilot on board at the time of the accident, and that it was occasioned by his negligent or improper conduct.[3]

§ 612. Some statute provisions have been made by the Congress of the United States for the regulation of passenger-ships in voyages to or from foreign ports. They require that the number of passengers which shall be taken on board of any ship, bound to or from the United States to or from any foreign port, shall not exceed two for every five tons of the ship's custom-house measurement; and that the quantity of water and provisions, which shall be taken on board, and secured under deck, by every ship, bound from the United States to any port on the Continent of Europe, shall be sixty gallons of water, one hundred pounds of salted provisions, one gallon of vinegar, and one hundred pounds of wholesome ship-bread. It is also made necessary for the master to have a manifest or list on board of all the passengers taken on board at any foreign port. These enactments are enforced by suitable penalties and forfeitures.[4] Certain regulations also have been made by Congress respecting steamboats, which are also

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[1] The Duke of Sussex, 1 W. Rob. Adm. R. 274.

[2] 1 Emerig. Assur. ch. 12, § 14.

[3] The Transit, Monthly (English) Law Magazine, vol. 1, p. 582; The Neptune 2d, 1 Dodson, R. 467; The Gerolamo, Monthly (English) Law Magazine, vol. 3, p. 102, 103.

[4] Statute of Mar. 2, 1819, ch. 46; Statutes at Large, vol. 3, p. 488; 3 Story, U. S. Laws, 1722.

deserving of notice in this place, as they materially affect the responsibility of the proprietors thereof.

ART. X. SPECIAL OR QUASI BAILEES FOR HIRE.

§ 613. There is a class of bailments not exactly falling under any of the heads already examined, which bears some analogy to cases of deposits for hire, or *Locatio custodiæ*, and to judicial deposits under the French law.[1] Such are cases of POSSESSION OF PROPERTY BY CAPTORS, BY REVENUE OFFICERS, BY PRIZE AGENTS, BY OFFICERS OF COURTS, BY FINDERS OF LOST PROPERTY ON LAND, AND BY SALVORS, who have preserved property at sea, and are entitled to salvage. All these seem quasi bailees, or depositaries for hire.

§ 614. First, in respect to CAPTORS. If the capture is tortious, and without any reasonable cause in the exercise of belligerent rights, the captors are bound for all losses and damages whatsoever, whether by casualty or otherwise. If, on the other hand, the capture is originally justifiable, the captors are deemed possessors *bonâ fide*, and the law is clear, that *bonâ fide* possessors are not responsible for casualties. But captors may, by subsequent misconduct, forfeit the protection of their fair title, and render themselves liable to be considered as trespassers from the beginning.[2] But mere irregularities will not so charge the captors, unless they produce an irreparable loss to the other party, or justly prevent a restitution of the property.[3] If there has been any embezzlement of the property, while it was in their custody, the captors must answer for that, whether it was done by themselves, or by any persons acting under them.[4]

§ 615. The first question in all cases of capture is, what is the degree of care or diligence to which the captors are bound.

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[1] Pothier, Traité de Dépôt, n. 84 to 118.

[2] The Betsey, 1 Rob. Adm. R. 93, 96.

[3] The Betsey, 1 Rob. Adm. R. 93, 99, 100.

[4] The Concordia, 2 Rob. Adm. R. 102; Der Mohr (Ship), 3 Rob. Adm. R. 129, 130.

An attempt has been made to charge them with the same degree of responsibility as innkeepers and common carriers; but this doctrine has been constantly repudiated.[1] On the other hand, an attempt has been made to bring down their responsibility to the same degree as that which the captors take, or may be presumed to take, of their own property. This doctrine has also been overruled.[2] The true rule, deducible from the nature of their rights and duties, seems to be, that they are bound to the same degree of diligence which prudent persons exercise in keeping their own property; that is, they are bound to ordinary diligence, and of course they are answerable for losses by ordinary negligence.[3]

§ 616. The reasoning of Lord Stowell on this subject seems entirely convincing.[4] When goods are taken justifiably *jure belli*, the captors have a right to bring them in for adjudication; and if in so doing any accident happens, they will be excusable, except for want of due care on the part of themselves or their agents. But however justifiable the original seizure may be, still the captors hold but an imperfect right. The property may turn out to belong to others; and if the captors put it into an improper place, or keep it with too little attention, they are liable to the consequences, if the goods are not kept with the same caution with which a prudent person would keep his own property.[5] The position sometimes taken, that captors are answerable only for the same care as they would take of their own property, is not a just criterion in a case of this sort. In cases of capture there is no confidence reposed, nor any voluntary election of the person in whose care the property is left. It is a compulsory act of justifiable force; but still of such force as removes from the owner any responsibility for the imprudent or incautious conduct of the prize-master. It is not

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[1] The Maria and Vrow Johanna, 4 Rob. Adm. R. 348, 350; The Rendsberg. 6 Rob. Adm. R. 142, 146.

[2] The William, 6 Rob. Adm. R. 316.

[3] The Maria, &c. 4 Rob. Adm. R. 348, 350.

[4] The Maria, &c. 4 Rob. Adm. R. 348, 351, 352.

[5] The Maria, &c. 4 Rob. Adm. R. 348, 351, 352; The Catharine and Anna, 4 Rob. Adm. R. 39.

enough, therefore, that a person in that situation uses as much caution as he would use about his own affairs. The law requires that there should be no deficiency of due diligence.[1] And if a loss occurs, the *onus* is on the captors to show that due diligence has been used, and that the loss was not from any fault or misconduct on the part of themselves or their agents.[2] If there has been any loss by the wilful negligence of the prize-master, by not taking a pilot at the proper place, or by not placing the vessel in a proper situation for quarantine, the captors will be responsible, as much as in cases of embezzlement.[3]

§ 617. If the goods have been unliveried by a decree of the Prize Court, and placed under the joint locks of the officers of the revenue and of the captors, in a warehouse, and are stolen from thence by burglars, without any want of due care by the bailees, the unlivery being under the direction of the Court, and the possession of the captors being the possession of the Court, the captors are not liable for the loss.[4]

§ 618. Secondly. The same rules which apply to captors would seem to apply to REVENUE OFFICERS and others, who seize property for supposed forfeitures. If the seizure is without a justifiable cause, they are responsible for all losses and damages. If the seizure is for a justifiable cause, they are responsible only for losses and damages occasioned by the want of ordinary diligence.[5]

§ 619. Thirdly. As to PRIZE AGENTS, the same principles, upon the like reasoning, would seem to prevail. Indeed, they do not seem essentially to differ from other agents, acting for hire, either as to duties or responsibilities.[6]

§ 620. Fourthly. As to OFFICERS OF COURTS. In respect to

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[1] The William, 6 Rob. Adm. R. 316, 318.

[2] Ibid.

[3] Die Fire Damer, 5 Rob. Adm. R. 357; The Freya, 5 Rob. Adm. R. 75; The William, 6 Rob. Adm. R. 316.

[4] The Maria, &c. 4 Rob. Adm. R. 348.

[5] Burke *v.* Trevitt, 1 Mason, R. 96, 101.

[6] The Rendsburg, 6 Rob. Adm. R. 142, 154 to 158; Ante, § 422, 455; Story on Agency, § 182 to 186.

property in the custody of the officers of a court, pending process and proceedings, such officers are undoubtedly responsible for good faith and reasonable diligence.[1] If the property is lost or injured by any negligent or dishonest execution of the trust, they are liable in damages. But they are not liable, as of course, because there has been a loss by embezzlement or theft. In order to charge them in such cases, the loss must have arisen from the culpable neglect or fraud, either of themselves, or of the agents or servants employed by and under them. And it seems, that the Court places such confidence in its officers, that it will require some proof at least of negligence or fraud in them, or their subordinates or servants, before it will throw the burden of proof upon them to exonerate themselves from the charge.[2] The degree of diligence which officers of the court are bound to exert, in the custody of the property, seems to be such ordinary diligence as belongs to a prudent and honest discharge of their duties, and such as is required of all persons who receive compensation for their services.[3] This is the rule of the French law; and it is founded upon the mutuality of interest and benefit in the respective parties.[4]

§ 621. Generally speaking, the like rule applies to RECEIVERS and other depositaries appointed by the Court.[5] Pothier, however, thinks that the general receiver of a court (*Receveur des consignations*), who, in virtue of his office receives the property brought into court, becomes bound to all possible diligence, and is liable for the slightest neglect.[6] He founds his reasoning, however, upon circumstances peculiar to the French law, or at

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[1] See Ante, § 124 to 135.

[2] Burke *v.* Trevitt, 1 Mason, R. 96, 101; The Hoop, 4 Rob. Adm. R. 145; The Rendsberg, 6 Rob. Adm. R. 142, 157; Browning *v.* Hanford, 5 Hill (N. Y.), R. 592. See Trotter *v.* White, 26 Miss. R. (Cushman), 93.

[3] The Rendsberg, 6 Rob. Adm. R. 142, 154, 156, 169; Burke *v.* Trevitt, 1 Mason, R. 96, 100, 101.

[4] Pothier, Traité de Dépôt, n. 92, 96.

[5] Knight *v.* Plimouth, 3 Atk. R. 480; Beauchamp *v.* Silverlock, 2 Chanc. R. 9; Horsley *v.* Chaloner, 2 Ves. R. 85; Rowth *v.* Howell, 3 Ves. Jr. R. 566; Wren *v.* Kirton, 11 Ves. Jr. R. 377.

[6] Pothier, Traité de Dépôt, n. 111.

least upon circumstances not applicable to receivers in general, either in England or America.

§ 621 *a*. Fifthly. In respect to FINDERS of lost property on land. We have already seen, that persons in this predicament are treated as *quasi* depositaries, and therefore, in general, they are, like other gratuitous depositaries, bound only to slight diligence, and are responsible only for gross negligence.[1] We have already seen, that, although mere finders of lost property on land are not entitled to salvage, yet they are entitled to receive full compensation for all reasonable and necessary expenses incurred about the things found and preserved by them.[2] The grounds upon which they are denied salvage seem scarcely capable of any solid vindication, either upon principles of natural justice and equity, or of sound public policy. But if the owner offers a specific reward to any finder who retains the property, the latter will be entitled to a lien for the reward.[3]

§ 622. Sixthly. As to SALVORS, strictly so called. Whenever, upon the high seas, or on the sea-coast, or elsewhere, within the admiralty and maritime jurisdiction (which is ordinarily limited to places within the ebb and flow of the tide), any services are rendered, by persons not composing the ship's crew, to ships in distress, by saving them or their cargoes from impending perils and losses, or by recovering them after they have been lost, or by bringing them in and preserving them, when found derelict, in order to have them restored to the rightful owners, such persons are denominated SALVORS; and they are entitled to a compensation for their services, which is known by the name of SALVAGE.[4] As soon as they take pos-

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[1] Ante, § 84 to 88.

[2] Ante, § 121 *a*. Lord Chief Justice Eyre has said all that can be said, to reconcile us to the doctrine of the common law on this subject. But it must be confessed, that his vindication is far from being satisfactory. Nicholson *v.* Chapman, 2 H. Black. R. 254, 257, 258, cited at large, Ante, § 121 *a*, note (4). See Salter *v.* Hurst, 5 Miller (Louis.), R. 7, as to salvage at the mouth of the River Mississippi; Wentworth *v.* Day, 3 Metc. R. 352.

[3] Wentworth *v.* Day, 3 Metc. R. 352. See Wilson *v.* Guyton, 8 Gill, R. 213.

[4] Abbott on Shipp. P. 3, ch. 10, § 1, 2, 5th edit.; 3 Kent, Comm. Lect. 47, p. 245, 4th edit.

session of the property for the purpose of preserving it; as, for example, if they find a ship derelict at sea; or if they recapture it; or if they go on board a ship in distress, and take possession with the assent of the master or other persons then in possession; in all such cases they are deemed *bonâ fide* possessors, and their possession cannot be lawfully displaced by any third persons.[1] They have a lien on the property saved for their salvage, which the laws of all maritime countries will respect and enforce.[2]

§ 623. Persons thus undertaking to act as salvors are responsible not only for good faith, but for reasonable diligence in their custody of the salvage property. If they are guilty of gross negligence, or of embezzlement, or of fraud, they ordinarily forfeit all their title to salvage.[3] But whether, besides a forfeiture of their claims for salvage, they may not also, in a case of gross negligence or fraud, be positively responsible to the owners of the property for losses occasioned by such negligence, does not appear ever to have been the subject of any direct judicial determination. Indeed, it does not anywhere appear what is the degree of diligence to which they are bound; whether, like a bailee for hire, they are bound to ordinary diligence, or, like a depositary in a case of *miserabile depositum*, to slight diligence.[4] It may be thought that a close analogy is furnished in the case of a mere finder of goods on land, who incurs (as has been seen[5]) the responsibility of a mere depositary without hire.[6] But a finder of goods on land is not (as we have also seen[7]) entitled to receive any compensation, as a salvor at sea is; and this circumstance seems to furnish a fit ground for a distinction, whenever a case shall arise which shall call for a decision upon the point. Their

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[1] The Blenden-hall, 1 Dodson, R. 414.

[2] Abbott on Shipp. P. 3, ch. 10, § 1 and 2; Id. § 11, 13, 5th edit.

[3] Mason *v.* The Blaireau, 2 Cranch, R. 240; s. c. 1 Peters, Cond. R. 397.

[4] Ante, § 44, 44 *a*.

[5] Ante, § 84, 88, 121 *a*, 621 *a*; Doct. and Stud. ch. 38.

[6] Abbott on Shipp. P. 3, ch. 10, § 1 and 2, 5th edit.; 3 Kent, Comm. Lect. 47, p. 245, 4th edit.

[7] Ante, § 121 *a*, note (4); Ante, § 621 *a*.

rights, and duties, and responsibilities, indeed, seem to approach most closely to those of persons who let out their labor and services, as well as undertake the custody of things for hire. Under such circumstances, the just rule applicable to them would seem to be, at least, that of ordinary diligence.

§ 624. Where salvage property has been brought into port, and, pending a suit for compensation, a part of it perishes by accident, as by fire, without any default on either side, if the property remains in the custody of the Court, the loss is to be borne by the owners and salvors as a common loss. But if the property has been delivered to either party upon an appraisement, the loss is then to be borne exclusively by such party; for he then takes upon himself the exclusive risk.[1] The consideration of the subject of salvage at large belongs more appropriately to the law of shipping; and, therefore, it will not be further enlarged upon in this place.[2]

§ 625. These Commentaries upon the Law of Bailments are now brought to a conclusion. Upon a review of the whole subject, it will at once occur to the reader, that a great variety of topics, discussed in the Roman and foreign law, remains wholly unsettled in the common law. He will also be struck with the many ingenious and subtile distinctions, singular cases, refined speculations, and theoretical inquiries, to which the free habit of the civilians conduct them in the course of their reasoning. Let it be remembered, however, that if some of these distinctions and speculations and inquiries seem remote from the practical doctrines of the common law, they may yet be of great utility in the investigation and illustration of elementary principles. They employed the genius, and exhausted the learning of many of the greatest Jurists of antiquity; and they were thought worthy of being embodied in the texts of Justinian's immortal Codes. In modern times, the noblest minds have thought, that a life of laborious dili-

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[1] The Three Friends, 4 Rob. Adm. R. 268.

[2] See Abbott on Shipp. P. 3, ch. 10, § 1, 2, 11, 12, and notes to Amer. edit. 1829; 3 Kent, Comm. Lect. 47, p. 245 to 248, 4th edit. As to the apportionment of salvage, see the Henry Ewbank, 1 Sumner, R. 400, and the Louisa, Jurist, May 20, 1843, p. 429; s. c. 2 W. Rob. Adm. R. 22.

gence was well rewarded, by gathering together illustrative commentaries in aid of these texts. What, indeed, was juridical wisdom in the best ways of imperial Rome, what is yet deemed the highest juridical wisdom in the most enlightened and polished nations of Continental Europe, ought not to be, and cannot be, matter of indifference to any, who study the law, not as a mere system of arbitrary rules, but as a rational science. The common law has silently borrowed many of its best principles and expositions of the law of contracts, and especially of commercial contracts, from the Continental jurisprudence. To America may yet be reserved the honor of still further assisting in its improvement, by a more intimate blending of the various lights of each system in her own administration of civil justice.

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